No. 19438

In the

United States Court of Appeals

for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation; et al.,

Appellants,

vs.

SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, a voluntary association; et al.,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division

Brief on Rehearing of Appellant Southern Pacific Company

WILLIAM R. DENTON
W. A. GREGORY
65 Market Street
San Francisco, Calif. 94105

Attorneys for Appellant Southern Pacific Company

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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INTRODUCTION

Pursuant to order of the Court granting rehearing upon the Petition of Switchmen's Union of North America, Appellant Southern Pacific Company submits this brief.

Before turning to a discussion of the Court's order and questions raised thereby, Southern Pacific wishes to make it clear that it believes the Court has accurately evaluated the contentions and authorities of the parties in reaching

its opinion of July 20, 1965. The Court correctly and fairly dealt with the issues and authorities raised by the parties, and its opinion is fully supported by the record.

In accordance with the Court's order that the rehearing will be upon the original briefs already on file as supplemented by this memorandum, Southern Pacific will not reiterate or discuss again any of the authorities or points already made in prior briefs. The points and authorities in prior briefs of Southern Pacific remain as cogent today as they were when written even though the Court may not have dealt with them in its opinion. Of particular weight is the doctrine of the *Howard* case in which the Supreme Court said:

> "Bargaining agents who enjoy the advantage of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers." *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768, 774 (1952).

I.

THE CRAFT LINE SEPARATING ROADMEN FROM YARDMEN IS ESTABLISHED BY A GEOGRAPHICAL SEPARATION. THIS IS AN UNDISPUTED FACT IN THE CASE.

The Court's order granting the petition for rehearing is predicated upon the possibility that it was in error in construing the existing collective bargaining agreements as establishing craft lines separating roadmen from yardmen along geographical lines. The Court was not in error. The nature of the switching and station work performed by these crafts and the skills needed to perform it are essentially the same for both crafts. Hence the only way to distinguish roadservice from yardservice is by the location of the work. This is evidenced by the following references:

(1) The counterclaim of each appellant contains the following section numbered V (TR 97, 106, 111):

"At all times material to this action Southern Pacific has performed switching and allied services for shippers and receivers of freight as provided in published tariffs and as required by the Interstate Commerce Act. When such shippers and receivers are located within established switching limits where switchmen are employed and yard service has been established (hereinafter referred to as established yards), the switching and allied service required by them is performed by switchmen, switch foremen (yard conductors) and employees of other classifications pursuant to the provisions of the collective bargaining agreement between Southern Pacific and its Switchmen and Switchtenders represented by SUNA effective September 1, 1956, (hereinafter called Switchmen's Agreement). This same service within established yards has been performed by switchmen (yardmen) for many years pursuant to this collective bargaining agreement, which was originally negotiated between Southern Pacific and the Brotherhood of Railroad Trainmen, which organization was replaced by SUNA when the latter was certified by the National Mediation Board to represent the yard personnel (switchmen) in 1951. From and since the latter date SUNA has continued and maintained the same collective bargaining agreement with amendments from time to time.

When the aforementioned shippers and receivers of freight are located outside of established yards (hereinafter referred to as road territory) the switching and allied service required by them is performed by trainmen (brakemen) and conductors who operate throughout road territory as road crews. These trainmen and conductors perform the switching and allied services in road territory pursuant to the provisions of the collective bargaining agreements between Southern Pacific and the General Committee, Brotherhood of Railroad Trainmen, effective December 16, 1939, as revised October 5, 1959, as amended (hereinafter called Train-

men's Agreement), and between Southern Pacific and its conductors represented by the General Committee of Adjustment, Order of Railroad Conductors and Brakemen, effective July 16, 1955 (hereinafter called Conductors' Agreement). The latter two organizations were certified by the National Mediation Board to represent trainmen and conductors on Southern Pacific many years prior to 1951 and have continued such representation to the present time."

Appellee admits these paragraphs in the Third Defense of its answer (TR 151).

(2) SUNA in both its Petition for Rehearing (p. 2) and its Response to Replies of Appellants (p. 3) states that "the National Mediation Board follows the easily administered test of place of work" in drawing the line between road and yard employees.

(3) The agreements themselves state where the geographical line is located.

(a) The SUNA agreement (Ex. B to Affidavit of K. K. Schomp), Article 23, Section (b) reads in part as follows:

"Location of yard limit boards as of October 1, 1934 establishes switching limits in all yards . . . (p. 37)

(b)The BRT agreement (Ex. C to Affidavit of K. K. Schomp), Article 44, Section (e) reads exactly as the SUNA agreement above quoted (p. 102).

(c) The ORC&B agreement (Ex. D to Affidavit of K. K. Schomp), Article 48, Section (c) reads substantially as does the SUNA agreement above quoted (p. 94).

The foregoing provisions of each agreement (and there are similar provisions in the agreements covering engineers

and firemen) define the boundaries of the 40 closed yards referred to in the record and in the opinion of the Court.[1]

(4) The Presidential Railroad Commission recognized the geographical boundaries between the crafts of road service and yard service when analyzing the subject. Its Report dated February 26, 1962, contains the following analysis on page 176.[2]

> "*Road Crews Performing Work in Yards.* It is clear that the line of demarcation which has been drawn between road and yard work has given rise to a number of inefficient and wasteful practices, particularly with respect to road crews performing work in yards. There are a number of tasks or work functions which are common to the normal duties of employees whether engaged in road or in yard service. As a matter of fact, at points where yard service has never been maintained the work which a road crew may be required to perform without any payment (other than the wages for a normal road day) is generally indistinguishable from that which yard crews at other points perform as part of their regular assignments. Further, there are tasks which yard crews under the present rules perform at points beyond preexisting geographical switching limits which are also identical to those which the road crews perform. Employees in both services work with the same equipment and use essentially the same skills in the performance of their work assignments."

It is apparent from the portion of the Report of the Presidential Railroad Commission set forth in Appendix B hereto that the clear line between road work and yard work developed historically. The line was established at a time when the same unions represented both roadmen and yard-

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1. A list of the closed yards as set forth in Appendix A hereto.

2. Report of the Presidential Railroad Commission, Part V, Chapter 12, "Combination of Road and Yard Service" is set forth in full in Appendix B hereto.

men, and hence it formerly was more harmonious and less rigid than it is today on Southern Pacific where rival unions represent the crafts—SUNA for the yardmen and BRT and ORC&B for the roadmen.[3] The line became sharp and obligatory during and after the handling of railroad labor matters by the Government during World War I, by the War Labor Board, and subsequently by the National Railroad Adjustment Board and the National Mediation Board under the Railway Labor Act. The geographical division has been quite clear at all times since the establishment of the National Mediation Board to handle representation and jurisdictional disputes. It was fixed in writing on Southern Pacific the same year that the present Railway Labor Act was passed (1934).

But for the well understood geographical separation of road work from yard work, it would be a practical impossibility to have separate representation and separate crafts for road employees and yard employees. Without the lines between them the two crafts would blend and intermingle indistinguishably because the nature of their work, their skills, and their equipment are essentially the same.

II.

THE LINE BETWEEN THE ROAD AND YARD CRAFTS HAS BEEN JUDICIOUSLY MAINTAINED BY THE NATIONAL MEDIATION BOARD IN PERFORMING ITS FUNCTION OF SETTLING DISPUTES UNDER SECTION 2 NINTH OF THE RAILWAY LABOR ACT.

The historical development of the division between road work and yard work is briefly and generally covered by the

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3. For the engine crafts (engineers and firemen) the same unions, The Brotherhood of Locomotive Engineers and The Brotherhood of Locomotive Firemen and Enginemen, represent both yard and road engineers and firemen respectively.

discussion of the Presidential Railroad Commission in Appendix B. The separation developed because the employees insisted that limits be placed on the amount of work a crew was to be asked to perform. Switching limits were frozen at their location in 1934. The separation was defined so that all employees understand where the line is. Yard employees know that if they are called upon to go beyond the switching limits, they can claim additional pay, and road employees know that if they are called upon to switch cars within switching limits where yard crews are employed, they can claim additional pay.

At first the men who performed the work generally had joint road and yard seniority. That is, both classes of service were performed by one craft and were represented by the same unions just as the engine service employees of today, and the men might be on road work for a while and then on yard work depending upon which type of work they preferred and could hold by their seniority. Subsequently as to the trainmen and yardmen, separate seniority rosters for the different crafts of employees doing yard service work and road work became more common. Essentially the men thus became restricted to one craft's work, and did not accrue seniority in the other craft. There was still some interplay, however, for the need for men in road work fluctuated. For example, if road work declined and vacancies existed for additional yard employees, roadmen could work temporarily in yard service and vice versa. There was an ebb and flow both ways.

Later, on Southern Pacific with the representation of yardmen being won by SUNA so that rival unions represented the two crafts, there became less interchange of employees and essentially today there is none. SUNA does

not want BRT men working in yards, and it does not want BRT men doing work outside of yards which SUNA could do inside of them. SUNA is trying to block out the BRT and at the same time increase the work assigned in yards and the number of established yards. The frequency and closeness of the results of the elections demonstrate the keenness of the rivalry on Southern Pacific.

The soundness of the Court's Opinion is strongly supported by consideration of the 1964 election of yardmen on Southern Pacific in which SUNA defeated BRT in the representation dispute. Southern Pacific has no objection to the Court giving consideration to the certifications of SUNA in 1958 and 1964 and to the National Mediation Board's procedures in connection therewith. (The point is raised in the Court's Order, p. 3.)

The 1964 election followed by several years the serving by SUNA of the purported Section 6 demands at issue herein. It also followed the commencement of this litigation. Nevertheless, at no time did SUNA contend or urge the Mediation Board to consider that City of Industry and the other locations in question were yards within the definition of the switchmen's craft. The only employees of Southern Pacific's Pacific Lines who voted in the election were those employed in the 40 closed yards previously referred to. (The yard employees of the Atlantic Lines also voted, but they have no relevancy to the issues of this case.) The unit of yard employees involved in the representation dispute was expanded in the 1964 election to combine both the Pacific and Atlantic Lines of Southern Pacific (because of the merger of two formerly separate corporations), but no question was raised about the appropriateness of only the employees of the 40 closed yards voting on Pacific Lines. These were the same Pacific Lines employees who had voted

in the 1958 and prior elections. In fact the matter of who was eligible to vote was agreed upon by representatives of SUNA and BRT.[4]

The employees at City of Industry and the other locations in question were not eligible to vote in the election of the representative for yard employees, and no one intended that they should have been eligible. If they were doing yardmen's work under yardmen's rates of pay, rules, and working conditions, they would have been considered yardmen and hence eligible to vote. No one contended that the locations in question were within the jurisdiction of the yardmen's craft or subject to the rates of pay, rules and working conditions of yardmen. SUNA did not contend or even suggest that the nature of the work at the locations was that of the craft of yardmen such that those locations should be within the unit voted. Had the issue been raised, the Mediation Board would have had to decide it in order to determine the scope of the unit and eligible voters in the election. The determination of the size of the unit is a prerequisite to holding the election. Perhaps the results of the election would have been different if the employees at the locations in question voted as part of the unit of the yardmen's craft. Nevertheless, without the sanction of either the employees affected or the Mediation Board SUNA now demands the right to have its agreement apply to the work and the employees performing it at City of Industry and the other locations. As will be further discussed below, yardmen and roadmen cannot intermingle in the performance of switch-

4. Attached hereto as Appendix C is a copy of the agreement dated September 23, 1964, of BRT and SUNA on eligible voters. To be an eligible voter an employee had to be on one of the seniority rosters of yard service employees. These are the rosters of the 40 closed yards.

ing work at the same location.[5] They cannot share the work, for the jurisdiction of one excludes participation by the other. Hence, should SUNA achieve its demands, the road employees at City of Industry and elsewhere who now do the switching and allied work would be displaced by yard employees.

The Court's Opinion is supported by the citations of the Mediation Board cases on page 2 of SUNA's Petition for Rehearing. Contrary to what SUNA states in its Petition, the Mediation Board's test for determining whether men who perform both road and yard work from a common seniority roster shall be classified as roadmen or yardmen is not the "majority of hours worked" (SUNA Petition, p. 2), but rather the test is the nature of the rates of pay, rules, and working conditions applicable to the men and work in question. Regardless of the test to be applied in resolving the issue, the point here is that the issue is one for the Mediation Board and not the courts. As stated in the Court's Opinion upon the authority of *General Committee v. M.-K.-T. R.R.*, 320 U.S. 323 (1943), where the line is to be drawn between the two overlapping crafts is a question for the Mediation Board to answer, and it has its own standards for making such determinations. The issue of craft lines is basically an inter-union issue rather than an employer-union issue. It cannot be settled by agreement between the employer and one of the unions. As a practical matter, however, when the competing unions, themselves,

5. Through an agreement reached with all five operating organizations in 1964 at locations where yard crews are employed and the amount of switching work varies, if the work declines to a point where the last yard crew assigned is working less than 4 hours within 10 for 10 consecutive working days the last yard crew assignment may be discontinued and the remaining work performed by road crews. The rule is not applicable at City of Industry or the other locations involved herein for no yard crews are employed at these points. The rule does not relate to establishing closed yards.

are in agreement, there is no dispute for the Mediation Board to resolve, and the position of the carrier is relatively unimportant *Brotherhood of Railway Clerks v. Association of Non-Contract Employees,* 379 U.S. 814, 14 L. Ed. 2d 133 (1965). The parties hereto concur on where the line now is between road and yard work. SUNA does not claim that its agreement applies at City of Industry or the other locations in question. Those locations are admittedly in road territory and are manned by employees represented by BRT and ORC&B.[6] The agreement reached by SUNA and BRT on who the eligible voters were for the 1964 election (Appendix C) recognized the point where the jurisdiction of BRT ended and SUNA began. The line was around the 40 yards already represented by SUNA.

In the Mediation Board's decision cited on page 2 of SUNA's Petition for Rehearing (Cases Nos. R-2753, R-2763, and R-2805),[7] the competing unions were not in agreement on the size of the unit to be voted or on the eligibility of employees at certain locations to vote in the yard service

6. TR 151. SUNA's answer to counterclaims of Appellants contains the following:

> "The three Section 6 notices referred to in the Counterclaims as having been served by the Plaintiffs, Switchmen's Union of North America, AFL-CIO, a voluntary association, et al, hereafter SUNA, on Defendant, Southern Pacific Company, all propose to amend the existing collectively bargained agreement between Plaintiff, SUNA, and Defendant, SP, relating to the wages, rules and working conditions of employees of Defendant, SP, in the craft or class of switchmen and/or yardmen so as to extend the coverage of said agreement to switching work and allied work of the same general nature performed and to be performed in geographical areas where said agreement does not now apply and where such work is not now being performed by employes of the Defendant, SP, in the class or craft of switchmen and/or yardmen but is being performed and is to be performed by road employees in the classes or crafts of road conductors or road brakemen."

7. Cases are set forth in full in Appendix D.

craft, so the Mediation Board settled the issue by determining in which craft the employees at the locations in dispute would fall. Although the locations were previously under the jurisdiction of the road service craft the Mediation Board determined that they should be under the jurisdiction of the yard service craft, and hence held the disputed employees eligible to vote for the representative of yardmen.

The cases, which were consolidated, involved on the one hand employees in designated closed yards subject to the BRT yardmen's agreement who were admittedly yardmen and eligible to vote. They involved on the other hand employees on the road seniority rosters in certain other yards where the work was admittedly yard service and which was covered by standard yard service rules and rates of pay found in the joint BRT-ORC&B agreement. Road crews were not permitted to switch in these yards. The only thing different about the yards in dispute was that the employees were governed by yard rules of a different agreement than that applicable to the closed yards and that the employees were taken from the seniority lists of road employees. The carrier considered the service at all of the yards in question to be yard service. The Mediation Board ruled that the employees performing yard service in the yards in question were eligible voters even if they were on the seniority lists of road employees. The Mediation Board distinguished certain cases cited to it in language equally applicable to distinguish the case at bar from the ones cited by SUNA as follows:

> "The files in each of the above cases have been examined. It was noted that in each and every one of these cases, the list of eligible voters was established by agreement between the organizations without the necessity of the Board passing upon any such questions

as those raised by the ORC in the present cases. It was further noted in this examination of the above files that the crews referred to by the ORC are those performing switching at intermediate points and locations where no yard crews are regularly assigned. Such crews have always been considered to be in road service, some of them on certain roads being referred to as road switchers, roustabouts, or road dodgers, and in the main, those crews are paid local freight rates. In some few cases, by negotiated agreement, crews performing such service receive yard rates, but they are still considered to be in road service. This situation applies particularly to the crews working out of Willbridge, on the Spokane, Portland & Seattle Railway."

The foregoing cases of the Mediation Board which SUNA cited in its Petition exemplify the authority of the Mediation Board to resolve issues of craft lines, issues which are essentially inter-union rather than company-union in nature. All employees of the craft are to be eligible to vote for the representative of the craft. The agreement of BRT and SUNA on eligible employees for the 1964 election of yard service employees did not include the employees at City of Industry and elsewhere. The Mediation Board accepted the agreement of the competing unions. No contention was made that the work at City of Industry, at Warm Springs, at Medford, at Gerlinger, or at Woodburn was yard work within the craft of yard service employees. SUNA is estopped from contending it now, and SUNA is in the wrong forum to urge the point anyway. As SUNA points out on page 2 of its Petition, crafts cannot be altered by agreement with the carrier. It follows that SUNA cannot expand its jurisdiction at the expense of BRT and ORC&B by a Section 6 notice seeking the agreement of Southern Pacific.

III.

THE FREEDOM OF EMPLOYMENT OF ROAD AND YARD SERVICE EMPLOYEES HAS DECREASED OVER THE YEARS. IT HAS DECREASED MOST RAPIDLY SINCE RIVAL UNIONS REPRESENTED THE CRAFTS.

The freedom of employees to secure work and the freedom of Southern Pacific to assign them to work largely depends upon the seniority provisions of the collective bargaining agreements. Only employees with seniority in the craft of yardmen can seek the work of the craft, and only employees with seniority in the craft can be assigned to the work of the craft.

Only furloughed employees of one craft can work in another craft on a temporary basis. When recalled to their principal craft, they must elect to go back to it and give up the seniority on the other or remain and relinquish seniority on their former craft. Generally, employees are not able to hold seniority in two crafts simultaneously if work is available to them in both. The exception to this rule is in crafts which are related promotionally. For example, a brakeman who has been promoted to a conductor retains his brakeman seniority and may alternate working as a brakeman and conductor depending on the need for his service.

The rights of employees to work in road and yard service are covered in the respective union agreements. Even after SUNA became representative of the yardmen, a furloughed brakeman could work in yard service if the work was available. When recalled to a brakeman's position he had to elect whether to return and relinquish whatever yard seniority he had acquired or remain in yard service and relinquish his road seniority. Likewise, a furloughed switchman could work in road service and make the same elec-

tion upon being recalled to yard service. (See SUNA agreement, Art. 23, Section (a)—Exhibit B to Mr. Schomp's Affidavit and BRT agreement, Art. 47, Section (a)—Exhibit C to Mr. Schomp's Affidavit.) As both the SUNA and BRT agreements specify in the above-cited Articles, but for this temporary transfer from one service to the other, yardmen will not have any rights in train service and trainmen will not have any rights in yard service.

The answer to question number one on page 2 of the Court's order is *no,* with the exception of the employee who has been furloughed as discussed above. Even this exception is in doubt today, for SUNA has submitted a case to the First Division of the National Railroad Adjustment Board under Section 3 of the Railway Labor Act, 45 U.S.C. 153, contending that as Article 23, Section (a), now reads (it was amended in 1959), Southern Pacific is in breach of the SUNA agreement if it even goes so far as to hire a furloughed brakeman (who continues to retain his seniority as brakeman) to work temporarily in yard service. SUNA's position is that rather than hire a Southern Pacific brakeman who is not working to fill a vacant yard position, Southern Pacific must hire a new employee. Southern Pacific is contesting this position of SUNA. It appears that because of the keen rivalry between SUNA and BRT, SUNA does not want any BRT men working, even temporarily, in the yards where SUNA represents the men.[8] The SUNA's position as stated on page 8 of its submission reads in part as follows:

> "It is the employes' position in this case that the carrier improperly permitted brakemen to work in Los Angeles Yard at times and dates of claim; that there

8. A copy of SUNA's submission to the First Division NRAB and of Southern Pacific's submission are in Appendix E. The list of brakemen used about which the dispute is raised has been omitted from each submission for brevity.

was no provision in the yard agreement to permit the use of such employes, *account such permissive rules had been removed from the yard agreement some five (5) months previous;* (see employes facts); therefore, the use of the brakemen as switchmen in yard service violated the provisions of the yard agreement heretofore reproduced. Accordingly, the claims should be sustained in line with binding yard settlements and Special Board Awards applicable to circumstances where brakemen are used in yard service."

The foregoing quotation demonstrates why road employees would be totally displaced at City of Industry if SUNA obtains jurisdiction over it and has its agreement apply as demanded.

Southern Pacific's position as stated on pages 7, 8 and 9 of its submission is as follows:

"The above-named individuals had been in service with carrier as brakemen (for less than two weeks in most instances and prior thereto with the Union Pacific Railroad), but because of insufficient work as brakemen they were cut off from such service and were then reemployed by carrier as switchmen at Los Angeles Yard. When carrier again needed additional brakemen, the above-named individuals had the option of continuing in carrier's service as switchmen, with seniority as such from date so established following their employment as switchmen, foregoing any rights they may have had under the agreement covering carrier's trainmen, represented by the Brotherhood of Railroad Trainmen; or, resigning as switchmen, thereby terminating their seniority and status as such under provisions of the current agreement and accepting service as brakemen. Each of the above named accepted the latter option as of March 16, 1960."

* * * * * * *

"No switchman at Los Angeles Yard was deprived of his seniority rights or exercise thereof as a result of

service performed by Switchmen Albrecht, Enderle, Gallagher, Hollis, Moore, Richcreek, Roberts and Spainhower on the various dates here involved. Those individuals were employed by carrier as switchmen on the respective dates shown in paragraph 3 of 'Carrier's Statement of Facts' and they established seniority as switchmen at Los Angeles as of their first day of compensated service as such, in the same manner as any other person newly employed by carrier for service as switchman at that point. They were used as switchmen on dates of this claim in accordance with their acquired seniority as switchmen and their resultant standing on the extra board for such service, or on regular assignments acquired through exercise of such seniority, in strict compliance with all applicable provisions of the current agreement and in the same manner as any other newly employed switchman. Their status with relation to other switchmen in Los Angeles Yard was no different than the status of any other newly employed switchman and their use for service at the various times and dates specified in this claim, being under the same conditions and agreement provisions applicable to any person newly employed by carrier as switchman, was thus without prejudice to the rights of any other switchman in Los Angeles Yard. In this connection the Board's attention is directed to claims involving a similar issue that were denied by this Board without aid of a referee in Awards 17653 and 18275."

In short, road employees do not have freedom to work in closed yard territory and yard employees do not have freedom to work in road territory. Their respective seniority and agreement provisions prohibit it except in cases of emergency. For the same reason that they cannot voluntarily go back and forth, Southern Pacific cannot mix their assignments. They remain permanently in one or the other of the crafts, and the only way to change is by giving up accrued

seniority in one craft and starting at the bottom of the seniority list of the other.

Question number two on page two of the Court's Order is partially answered above. The unions (BRT and SUNA) have bargained with Southern Pacific with regard to the men in the craft each represents leaving that craft and returning after working in the other craft. Because of the clarity of the craft line already discussed herein, there is no concept analogous to "pursuit of their craft, whether within or without closed yards" (p. 2 of Court's Order). Seniority is geographically defined within the craft. The limits of the craft are understood, and hence there is no mobility that would call for pursuit in and out of closed yards. As discussed in the principal briefs already filed by appellants, one craft cannot bargain about the work of another, and hence SUNA cannot bargain about yardmen working in road territory, and BRT and ORC&B cannot bargain about their men working in established yards (closed yards). The right to perform work does not flow over or across the geographical craft lines. The nature of the work is essentially the same on both sides of the line. It is done by the craft of employees on the side of the line where the work is located.

The location of Southern Pacific's customers is determined by those customers. The rail service to and for those customers is done where it must be done to give them the most efficient and economical transportation service as common sense would dictate and as the National Transportation Policy requires, 49 U.S.C., preceding § 1. A corporation having many plants requiring rail service will locate some in road and some in yard territory according to its own best interests. If rail crews and crafts obtained some sort of proscriptive right to each customer of Southern Pacific there could be no yard-road craft distinction. The result

would be chaos. Crews would clog the railroad trying to get to the switching points they "owned". The only practical way to separate the road and yard crafts is on a geographic basis, and this is the way it is done. As the Report of the Presidential Railroad Commission sympathetically indicates, the railroads have long been trying to reduce the inefficiency caused by the geographical division by making the line less inflexible.

From the railroad's standpoint, it would be best if there were no craft distinction between road and yard service. On the other hand, SUNA now has pending Section 6 notices (not involved in this case) which would further restrict Southern Pacific in the performance of its switching work. The demands ask for a rule restricting road crews in the performance of their normal work in yards and at the same time requiring all switching work—much of which for purposes of efficiency is performed in road territory—to be done only in the closed (established) yards. Thus, even today in spite of the recommendations of the Presidential Railroad Commission, SUNA is directing its efforts to reduce further the amount of freedom of employment that still exists between the road and yard crafts.

IV.

ARTICLE 10 OF THE SUNA-SOUTHERN PACIFIC AGREEMENT IS NOT APPLICABLE TO THIS CASE BECAUSE (a) THERE IS NO QUESTION OF FACILITATING INDUSTRIAL DEVELOPMENT, (b) THE CARRIER DOES NOT WANT TO CHANGE SWITCHING LIMITS, AND (c) NO YARD CREWS ARE EMPLOYED AT THE LOCATIONS IN QUESTION.

In response to question number three of the Court, Article 10 of SUNA's agreement and the corresponding articles of the other agreements (Article 44, section (e) of the BRT agreement and Article 48, section (c) of the ORC&B agreement) have no significance or relevance to this case.

To date, Southern Pacific has used these procedures to extend switching limits on two occasions. It extended the switching limits in one yard less than one-half mile and in another by slightly more than a mile. While in both cases no road switching work of any kind was brought within switching limits, certain territory formerly within the geographic area of road territory was brought within the limits of the particular closed yard involved. The extensions were merely to improve the handling of the work already being done in the yards, in other words, to make more room in the closed yards.

The reference of SUNA on page 3 of its Petition to the Presidential Railroad Commission's comment that collective bargaining in this area was "working well" refers not to establishing new closed yards and defining their boundaries as inferred by SUNA. Instead it refers to extending switching limits of existing closed yards under the terms of Article 10. The foregoing extensions on Southern Pacific neither altered existing road service or yard service nor did it establish any new service. The Commission said, "The machinery provided for the extension of switching limits has been working well" (Appendix B, p. 176).

Article 10 could not be used to establish a closed yard at City of Industry. This is in response to the third question of the Court. There are several reasons for the answer. First, the procedures of Article 10 are for the Southern Pacific's benefit. They may be invoked "where an individual carrier . . . considers it advisable to change" the existing switching limits (section (b)). Southern Pacific does not consider any change advisable in any situation referred to in this case. The purpose of the rule is to provide an avenue by which the carrier can enlarge a closed yard in order to achieve efficiency in the performance of industrial

and other types of switching service (section (a)). There is no question but that the switching provided by road crews at City of Industry and the other locations is both efficient and adequate. Hence Article 10 cannot be relevant on this basis.

The purpose of the procedure of Article 10 was to take care of the situation where the carrier needed more room for switching and where an industry located outside of switching limits was close enough to receive and needed to receive the service of yard crews. Perhaps it needed more frequent switching than road crews in that territory could provide. In such a case the carrier might want to be able to send yard crews beyond existing switching limits to do the work. This would infringe on the work of road crews in whose territory the industry was located. But the carrier could switch *new* industries with yard crews within four miles of the switching limits. The right to extend the limits to reach a nearby *old* industry thus avoided the obvious unfairness in service to the old industry. Southern Pacific has never attempted to invoke Article 10 to change switching limits in a manner that would infringe upon the work of road crews. Its two changes have been to improve the operations within the yard rather than to reach an industry with yard crews. Second, Article 10 is for changing switching limits at points where yard crews are employed. It is not for establishing new switching limits. The discussion of this point by the Presidential Railroad Commission speaks in terms of "extending switching limits". As a practical matter, Article 10 would be used for change in the manner of extension rather than contraction of the limits. But in no event would it be used to establish switching limits where crews would have to be employed. It speaks in

terms of changing "existing switching limits where yard crews are employed".

Third, the Article is not intended to be used at locations where no yard crews are employed (section (d)). No yard crews are employed at City of Industry or anywhere nearby. Section (b) is specifically limited to locations "where yard crews are employed". Article 10 does not provide a procedure for establishing a new closed yard. This is made clear in Section (d).

If SUNA argues that it merely intends to extend the Los Angeles switching limits to enclose City of Industry it would be an extension of more than 13 miles (the lowest figure in the record TR 49). If the Oakland switching limits are extended to Warm Springs it would be at least 21 miles (TR 156). The idea of such a huge extension is ridiculous because the extension merely to get at the switching work at City of Industry and Warm Springs would necessarily swallow up all intervening road territory which includes many other places where road crews switch and perform allied services. It would greatly encumber the efficiency of rail operations. The concept of extending existing switching limits as opposed to making the locations in question separate closed yards has never been injected or urged as an intention of SUNA's demands.

The prayer of SUNA's complaint initiated this litigation by seeking relief to restrain Southern Pacific from switching "at the place and yard located on Southern Pacific's Los Angeles Division named 'La Puente' and sometimes called 'City of Industry'" except by agreement with SUNA (TR 11). It was the establishment of yard switching service at the specific location and not all intervening mileage to the next closed yard that was put in issue be SUNA's demand. The complaint was supported by an

affidavit of Mr. Zies which further defined what SUNA meant by the place and yard called City of Industry. The affidavit refers in some detail to a map of the present and proposed facilities at City of Industry (TR 27). It was at City of Industry, not at other unidentified intervening locations, that SUNA was seeking to obtain the right to have the switching under its jurisdiction and agreement.

SUNA's demands would become even more outlandish if they were construed to extend existing limits because with a few more similar demands the entire railroad could become yard territory. The road service craft would be totally eliminated. While it may be desirable from the railroad's standpoint to have one instead of two crafts doing the work, SUNA cannot by serving Section 6 demands force the Southern Pacific to bargain about reducing and eventually eliminating the jurisdiction of the road service craft. The jurisdiction of the crafts and the respective unions can only be altered by the Mediation Board through elections and certifications. Southern Pacific cannot take it away by agreement with SUNA. If SUNA could compel bargaining on its demands, the road craft could by the same tactics endeavor to eliminate the craft of yardmen. The conflicting demands would cause a jurisdictional dispute of tremendous magnitude. (The likelihood of a strike to enforce the demands if held lawful needs no elaboration.) Where one craft begins and another ends is clearly within the province of the National Mediation Board as the Court's opinion has already stated. If any change is to be made in the jurisdiction of road and yard crafts already defined by the Mediation Board, such change must be made by the Board.

There are no yard crews at City of Industry or at the other locations in question so Article 10 (other than section (d)) has no significance or relevance to this case. Southern

Pacific, even if it so desired, cannot and could not use the procedures of Article 10 to make City of Industry a closed yard, and SUNA cannot bargain about transferring City of Industry from the agreements and jurisdiction of BRT and ORC&B to that of SUNA.

CONCLUSION

When the Court rendered its opinion the following facts were and they continue to be undisputed:

1. There are no issues of fact in the record.
2. The separation of the crafts having jurisdiction over yard work and road work is a geographical line.
3. The parties all understand where the line is and have defined it in their agreements.
4. City of Industry and the other locations in question are in road territory.
5. City of Industry and the other locations in question are not in any way covered by or subject to the jurisdiction of SUNA or its agreement with Southern Pacific.
6. Said locations are covered by and subject to the jurisdiction of BRT and ORC&B and their agreements with Southern Pacific.
7. The use of road crews at said locations to do switching and allied work under the BRT and ORC&B agreements does not in any way breach the agreement between SUNA and Southern Pacific.

The most complete treatment of the fact of the case pertinent to the Court's Order is found in the Affidavit of Mr. K. K. Schomp (TR 45).

In response to the Court's Order, Southern Pacific herein has made the following additional points:

1. Road and yard crews cannot intermingle or share the work of switching and allied service at a location where yard crews are not employed. For SUNA to take over City of Industry or elsewhere would automatically eliminate the road crews from switching at the location.
2. Article 10 is not relevant to this case (except section (d)) because at all locations in question no yard crews are employed. Article 10 cannot be used to establish new closed yards in what is now road territory.
3. The employees of each craft have practically no freedom to work or be assigned in the other craft except when furloughed and this exception is in dispute with SUNA. Neither craft can work in the territory of the other except to equalize time under Article 10, section (c) (and except as noted in footnote 5 above).

It is respectfully submitted that the Opinion of the Court should remain as written in disposition of this case.

William R. Denton
W. A. Gregory
65 Market Street
San Francisco, Calif. 94105

Attorneys for Appellant
Southern Pacific Company

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William R. Denton

(Appendices Follow)

Appendix A

Location

Southern Pacific (Pacific Lines) Yards

Western-Coast Division
- Port Costa
- Suisun
- Oakland
- San Francisco
- San Jose
- Watsonville Jct.

Sacramento-Salt Lake Division
- Gerber
- Roseville
- Sacramento
- Sparks
- Carlin

Portland-Shasta Division
- Brooklyn
- Salem
- Albany
- Eugene
- Roseburg
- Coos Bay
- Corvallis
- Klamath Falls
- Dunsmuir
- Weed
- Ashland

San Joaquin Division
- Stockton
- Tracy
- Fresno
- Bakersfield
- Mojave

Los Angeles Division
- Colton
- Indio
- Los Angeles
- Santa Barbara
- San Luis Obispo

Tucson-Rio Grande Division
- Yuma*
- Phoenix
- Tucson
- Nogales
- El Paso
- Tucumcari
- Douglas
- Bisbee

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*Under jurisdiction of Los Angeles Superintendent.

Appendix B

Chapter 12

Combination of Road and Yard Service

The Proposals

The Carriers propose the elimination of prohibitions or restrictions on the following activities:

(1) Use of passenger crews to perform switching or station work in connection with the cars of their own trains or to handle "light" engines of their own trains.

(2) Use of road crews in other than passenger service to perform any and all switching and station work and to handle light engines of their own trains.

(3) Use of yard crews to perform road work, or to perform work outside of switching limits.

(4) Right of management to designate or change switching limits or to establish or abolish yard or hostling service assignments.

The proposal contemplates the elimination of arbitraries, special or constructive allowances or penalty payments to any employee, or class or grade of employees, when road or yard crews perform any of the above described work.

The Carriers' proposal would establish a rule to provide that:

(1) Passenger crews would be required to perform any and all switching and station work in connection with cars of their own trains that might be required of them at their initial and final terminals and at all intermediate points.

(2) Road crews in other-than-passenger service would perform any and all switching and station work as might be required of them at their initial and final terminals and at all intermediate points, including the handling of "light" engines of their own trains, whether or not such switching and station work was in connection with cars of their own trains.

(3) When switching or station work is performed by road crews as provided in (1) and (2) above, such work would be [167] paid for as part of the road day or trip and additional compensation for such work would not be paid under road, yard or hostling rules and regulations. These provisions would apply whether or not yard crews, yard men, or hostlers are on duty when and where the work is performed.

(4) Yard crews would be required to perform both road and yard service and would also be required to perform service outside of established switching limits. Where such service is performed by a yard crew the work would be paid for as part of the yard day or tour of duty and additional compensation would not be paid for such work under either road or yard rules and regulations. These provisions would apply whether or not road crews are available when and where the work is performed.

(5) Yard crews, yard men, or hostlers would not be entitled to any penalty pay when road crews perform switching or station work or handle the light engines of their own trains; nor would road crews be entitled to any penalty pay when yard crews perform road work or perform service beyond switching limits as provided in (4) above.

(6) Management would have the exclusive right to designate and change switching limits, and to establish or abolish yard and hostling service and yard and hostling service assignments.

The Organizations propose that further combination of road and yard service be prohibited.

DISCUSSION

A. *Nature of the Issue*

In our discussion of the basis of pay proposals we indicated that there are entirely separate and distinct methods of compensating employees engaged in road service and of

compensating employees engaged in yard service. In addition to the distinction in method of compensation, distinction has evolved with respect to the type of work which may properly be performed by employees in the one class of service as opposed to employees engaged in the other. At the present time, mainly as a result of rulings by the Director General of Railroads, arbitration awards and interpretations of collective bargaining agreements by various railway labor tribunals, many work functions are held to be exclusively within the "jurisdiction" of the road service employees and others within the "jurisdiction" of the yard service employees. Thus, a line of demarcation has arisen between the two services which may not be crossed by the carriers in making daily work assignments without incurring liability for penalty payments. It is this line of demarcation which the Carriers seek to erase. [168]

Generally speaking, road service involves the movement of trains between two points or terminals. Yard service involves the movement or shunting about of cars to put a train together and make it ready for the road. The latter is commonly referred to as switching service.

Although yards vary greatly in size, purpose, and amount of activity, the general concept of a yard is an area consisting of a system of tracks within defined limits for the making up of trains, storage of cars, or other purposes. The term "switching limits" is generally used when referring to the boundaries within which yard crews may perform work. It is not to be confused with the term "yard limits". The two terms are not synonymous. Switching limits, having once been established by the carriers and the organizations, cannot be changed except by agreement. Yard limits, on the other hand, are designated by the carrier for operational purposes and generally they can be changed by unilateral action by the carrier.

The typical yard service employee, as we have pointed out earlier, reports for duty at a given point at a stated time and is released at the same point after the completion of his normal 8 hour tour of duty.

B. *The Historical Background*

In the very early days of railroading there was little separation of the two classes of service. In this respect the following remarks appearing in a study appended to the 1917 report of the Eight-Hour Commission are quite pertinent:

> In earlier days before separation and division of labor were so fully recognized in railway practice as at present, a single crew made up the train at initial terminal, took it over the road and put it away at its destination. This practice still pertains to some extent in passenger service.

In the agreements negotiated by the Organizations and the Carriers in the late 1890's and the early 1900's, some contained provisions affecting road crews working in yards and yard crews working on line of road. Where those agreements contained clauses with respect to a combination of road and yard service in one assignment, they generally were addressed only to the amount of compensation which the road crew would receive. In rare instances provision was made for yard crews performing work beyond switching limits. An interesting example of this is to be found in a 1910 Mediation Agreement between certain Southeastern carriers and the Brotherhood of Railroad Trainmen which provided that yardmen required to perform service outside of switching limits would be paid miles or hours, whichever produced the greater compensation for the class of service performed with a minimum of 1 hour; this compensation

was to be paid [169] in addition to the regular yard pay without deduction for the time consumed in such service.

In a 1913 arbitration award disposing of a controversy between the Burlington Railroad and both the Conductors and Trainmen, the arbitrators refused to grant a request of the employees for a rule providing that road crews be given all work outside yard limits and that yard crews not be run outside yard limits except in cases where the main line was blocked and there were no trainmen available. That award did, however, grant a rule providing:

> At points where yardmen are employed and are at the time in actual service, trainmen will not be required to handle trains or engines to or from yards and depots, nor to pick up or set out cars, nor to couple or uncouple air, signal or steam hose, nor to couple or uncouple safety chains, nor to do other work usually performed by car men where car inspectors or car repairers are employed.

During the period of Government control of the railroads in World War I the Director General issued Supplement No. 25 to General Order No. 27 under date of December 15, 1919, which provided as follows:

> ARTICLE X.—ARBITRARIES AND SPECIAL ALLOWANCES
>
> (a) Excepting payments under rules applying to work performed at initial and final terminals, and to final terminal delays, all arbitraries and special allowances applying to road service other than passenger, under rules, regulations, or practices, which conflict with the payment of single time, in miles or hours, from the time required to report for duty until released from duty at the end of the trip shall be eliminated.
>
> On roads where no rules are in effect covering work performed at terminals, the practices in regard to the

character of work permissible or duties required at terminals are not to be extended.

(b) Where the special payments under the rules, regulations, or practices which are retained under section (a) have been allowed independently or separately from the trip, they will continue to be so allowed, but at the former rates.

ARTICLE XX.—ARBITRARIES AND SPECIAL ALLOWANCES

(a) Where it has been the practice or rule to pay a yard crew, or any member thereof, arbitraries or special allowances, or to allow another minimum day for extra or additional service performed during the course of or continuous after end of the regularly assigned hours, such practice or rule is hereby eliminated, except where such allowances are for individual service not properly within the scope of yard service, or as provided in section (b).

(b) Where regularly assigned to perform service within switching limits, yardmen shall not be used in road service when road crews are available, except in case of emergency. When yard crews are used in road service under conditions just referred to, they shall be paid miles or hours, whichever is the [170] greater, with a minimum of one hour, for the class of service performed, in addition to the regular yard pay and without any deduction therefrom for the time consumed in said service.

This directive although captioned "Arbitraries and Special Allowances" clearly affected the combination of road and yard service and it appears to be the first national rule on the matter. Despite the Carriers' assertion that the pronouncements of the Director General gave no credance to a real separation between the two services, it is implicit in the

language of this General Order that the Director General recognize some separation.

From 1918 to date, the road-yard issue has been dealt with on a number of occasions by various tribunals concerned with the interpretation of railroad collective bargaining agreements. Reference to a few of their awards will suffice to indicate how the current concepts with respect to the separation between the two services developed.

Railway Adjustment Board No. 1 in a 1918 award held that yard limit boards could not be moved by management if a question of compensation was involved. In another award that Board said that it did not countenance the extension of the practice of using road crews to do yard work or using crews to perform other service after the completion of their day's work, or the practice of requiring road crews to do excessive switching at terminals. In still another case the Board sustained a claim for a minimum day's pay in road service in addition to the day's pay for yard service when a yard crew was assigned to a road trip during the course of its tour of duty.

The Railroad Labor Board (1920-26) decided a case in which it held that a road brakeman was entitled to an additional day at yard rates when he performed some switching work upon arrival at his terminal. In another case it held that a yard crew was entitled to be paid a minimum day because a road crew made up its own train on a holiday when the yard crew assignment was annulled.

In 1938 the First Division of the National Railroad Adjustment Board issued an award which has been often cited in subsequent decisions of that Board. In its findings the Board set forth its view with respect to payments due when a road crew was required to perform yard service or a yard crew was required to perform road service. The following

language of this Board appearing in its findings in that case quite accurately reflects the current thinking of the Board:

> As stated in Award No. 3110 this Division has held scores of times, in substance, that, in the absence of schedule or special agreement, road and yard work may not be combined in one assignment without incurring liability:
>
> (a) to the men performing the work, for a minimum day in each capacity; and
>
> (b) to men available but not used, entitled by seniority to the work and denied the right to perform it, the attendant pay of the work. [171]

The matter is one of much gravity because a failure to recognize or observe the principles involved may and has resulted in requiring payment of two extra days pay for a few minutes work, i.e., to the man who performs it, one day for his regular work and an extra minimum day for the additional work and a minimum day to the man denied the work.

The reasons are simple; as to the first man (the one who performed the work) the schedules contain separate articles governing road and yard work and as to each a basic day is provided of eight hours or less, 100 miles or less, etc. Consequently if either a road or yard man does fifteen minutes yard work and that is all there is of it for him to do, he is entitled to a minimum day for it although before or after doing it he may earn a day or more at road work. It is not correct to refer to it as a penalty; it is simply literal compliance with the express terms of the contract. As to the second man, i.e., the one denied the work, it is universally recognized that, if by virtue of his seniority rights—and they too are in part of the contract—he is entitled to perform certain work and that privilege is denied him and the work turned over to another, he should be compensated for his availability the same as though he had performed the work; and that likewise is not a penalty but

merely the carrying out of the contract. Some schedules contain specific provision as to what the compensation shall be less than a full day, as for example run-around rules allowing fifty miles (half a day) and the right to stand first out, but, when the schedule is silent as to what the compensation shall be, the only basis available is the minimum day rule. This Division has so decided in many cases.

Although there is a degree of consistency in connection with payments required when there is a crossing of the line of demarcation between road and yard work the awards of the First Division of the National Railroad Adjustment Board, as well as those of earlier tribunals, are not uniform with respect to where that line should be drawn. This has prompted some carriers to seek what have been characterized as "escape" agreements in an attempt to clarify the situation on their properties and to avoid potential liability for multiple payments for the performance of a given task. A typical agreement of this nature provides for the maintenance of a given number of yard assignments, describes conditions under which road crews may perform certain switching in yards with no additional compensation other than that required under terminal delay rules and provides (in addition to the road pay) for payments ranging from actual time spent in switching in the yard with a minimum of 1 hour to a minimum day (regardless of the amount of time spent in switching in the yard).

C. *The Problem Areas*

The problem areas in connection with the line of demarcation between road and yard service fall into three main categories:

(1) Restrictions upon the work which road crews may perform in yards. [172]

(2) Discontinuance of assignments of yard crews where the amount of yard work has decreased to a minimal amount.

(3) Extending and contracting switching limits.

1. *Restrictions on Road Crews Performing Work in Yards.* The Carriers conducted a survey by questionnaire of 26 Class I line-haul carriers to determine current practices with respect to restrictions upon road crews performing work within switching limits. There were 13 different categories of work functions covered in the survey and the participating carriers were asked to signify whether there were any absolute or qualified restrictions upon road crews performing such tasks at initial terminals, intermediate points, and final terminals and to show whether the restrictions varied if (a) yard crews were employed and on duty, (b) yard crews were employed but not on duty, and (c) yard crews were not employed.

The 13 items of work involved were as follows:

Road crews accompanying or handling engine of own train in freight service.

Road crews accompanying or handling engine of own train in passenger service.

Road crews handling caboose of own train in freight service.

Road crews picking up and/or setting out cars of own train from or to more than one track in freight service.

Road crews picking up and/or setting out cars of own train from or to more than one track in passenger service.

Road crews picking up cars from and/or setting out cars to more than one yard of a terminal in freight service.

Road crews picking up cars from and/or setting out cars to more than one point in passenger service.

Road crews picking up cars from and/or setting off to other than main, running, departure, or receiving tracks in freight service.

Road crews picking up cars from and/or setting off to other than main or station tracks in passenger service.

Road crews cutting out bad order cars, no-bill cars, etc. in freight service.

Road crews cutting out bad order cars in passenger service.

Road crews performing switching not in connection with cars of own train in freight service.

Road crews performing switching not in connection with cars of own train in passenger service. [173]

It is clear from the survey that there is no uniformity among the various railroads in the extent to which road crews may be required to perform the various tasks set forth without penalty. Generally speaking, more restrictive conditions were found to affect work at terminals than at intermediate points. Further, conditions were most restrictive when yard crews were on duty, less restrictive where yard crews were employed but not on duty, and least restrictive where yard crews were not employed.

The effect of these restrictions upon the carriers' operations can readily be seen by citing a few examples. On many railroads, in yards where yard crews are employed, when a road train has been made up and it becomes necessary to switch out a defective car or a car without proper billing, the yard crew must be used to switch out such cars despite the fact that the road crew is on duty on the train and its engine coupled to it. This entails getting a yard engine and crew up to the train and setting aside the road engine while

the yard crew does the work involved. In some instances the yard engine couples on to the road engine and remains coupled while it goes about its work. On some properties, when a road train arrives at a terminal and it becomes necessary to change cabooses, the road crew may stand by while the yard crew performs the service. In other situations, the road crew is restricted to picking up only at one yard in a terminal consisting of two or more yards; it is, therefore, necessary for yard crews to bring "cuts" of cars to the departure yard from distant yards before departure of the road train even though the road train may pass the same yards on its way out of the terminal and by a simple switching move could pick up the cars. A similar situation exists in connection with the movement of an inbound freight train. If the road crew is restricted from setting off in more than one yard on its inbound trip it may pass yard tracks to which cars in its train are destined. It must move those cars to the terminal yard in which it is to dispose of its train and a yard crew is then required to handle such cars back to the point of destination.

2. *Discontinuance of Yard Assignments.* Because of restrictions upon road crews performing switching, many carriers, to avoid penalty payments, have retained yard crews where there is only a minimal amount of switching. The Carriers have cited a number of examples of yard crews paid for at least 8 hours on duty and performing from 2 hours to 4½ hours of work per day. In the preponderance of the examples cited in the Carrier study about 3 hours work per day was performed. In the Carriers' exhibit on this phase of the road-yard question, one of many similar examples given is as follows: at Jonesboro, Arkansas, the St. Louis and San Francisco Railroad Company [174] maintains a yard engine which performs about 2 hours work

per day and handles on the average about 20 cars per day. These generally are loaded cars which the yard crew delivers to consignees. The crew also relocates cars from the industry sites to the yard area. On the day of the Carrier's survey the crew went on duty at 8:30 a.m. and completed all its work by 10:30 a.m.

A joint agreement, dated December 12, 1947, between the carriers and the Conductors together with the Trainmen contained the following clause with respect to abolishment of yard service assignments:

> Remanded to individual Managements and General Committees for negotiations whereby the last remaining yard assignment in a particular yard may be abolished where yard service requirements have decreased to a point that abolishment is justified.

The other three operating organizations did not reach accord with the carriers in the general movement which resulted in the agreement cited. That dispute was then referred to Emergency Board No. 57 which filed a report, dated May 27, 1948, in which the Board stated:

> The problem involved in this proposal affects all crafts engaged in yard work and can best be solved through the application of processes of collective bargaining. Because of the absence of some of the parties concerned we are constrained to remand the matter, without more comment, to subsequent negotiations, first, on an industry-wide basis, and failing settlement there, to local negotiation.

According to Carrier testimony, the attempts of individual carriers to negotiate rules which effectively permit the abolishment of yard service have met with little success in the majority of instances.

3. *Switching Limits.* As appears from our discussion of the historical development of distinctions between road

and yard service, there were also restrictions on yard crews performing work on the road. Early in 1950 the carriers took steps to secure relief from these restrictions.

The Switchmen's Union of North America and the Western Carrier Conference Committee entered into an agreement, dated September 15, 1950, which in effect afforded the carriers involved the right to expand and contract switching limits to conform to the needs of the service. This agreement has been extended to cover all carriers on which the Switchmen's union represents the yardmen.

The Carriers represented by the Eastern, Western and Southeastern Carriers Conference Committees entered into a national agreement, dated May 25, 1951, with the Brotherhood of Railroad Trainmen. Under the agreement the carriers were afforded the right to use yard crews to serve new industries provided, the switch governing movement [175] from the main track to the track serving the industry was located at a point no more than 4 miles from the existing switching limits. The agreement also provided for negotiation, mediation, and final and binding arbitration with respect to proposed changes in switching limits. Agreements of the same nature were consummated with the other three organizations representing operating employees under date of May 23, 1952.

D. *Analysis*

The proposal as made by the Carriers involves broad and sweeping changes in the traditional concepts of the separability of road and yard service. The record does not support the need for such changes although there is ground for relief in some of the areas we have heretofore discussed.

Extension of Switching Limits. There is little need to discuss at length the question of extending switching limits.

The agreements with the five Organizations representing the operating employees in most respects appear to be working satisfactorily. The Carriers have attained a degree of flexibility in the use of yard crews to service new industries and in most instances road service employees affected are protected by provision for "equalization of time" spent by yard crews working beyond the switching limits. The machinery provided for the extension of switching limits has been working well; so well, as a matter of fact, that in the majority of instances in which the carriers have proposed switching limit extensions, agreements have been reached without resort to arbitration. Accordingly, there is no need to disturb the existing situation in this area.

Road Crews Performing Work in Yards. It is clear that the line of demarcation which has been drawn between road and yard work has given rise to a number of inefficient and wasteful practices, particularly with respect to road crews performing work in yards. There are a number of tasks or work functions which are common to the normal duties of employees whether engaged in road or in yard service. As a matter of fact, at points where yard service has never been maintained the work which a road crew may be required to perform without any payment (other than the wages for a normal road day) is generally indistinguishable from that which yard crews at other points perform as part of their regular assignments. Further, there are tasks which yard crews under the present rules perform at points beyond preexisting geographical switching limits which are also identical to those which the road crews perform. Employees in both services work with the same equipment and use essentially the same skills in the performance of their work assignments. [176]

In the light of the foregoing, it can hardly be said there are true craft lines between road and yard service although the jurisdictional lines which have been drawn are in many respects similar to those which are drawn between the work of true crafts as that term is commonly used in industrial relations parlance. The joint seniority system, under which an employee may hold rights to work in either road or yard service (but not both during the same tour of duty), is in effect on a number of railroads. Many thousands of operating employees hold these rights. This, too, is not a common characteristic of a craft-oriented labor force.

The Carriers' proposal for all practical purposes would completely obliterate the distinction between road and yard service. They propose a merging of all road and yard seniority lists to lessen the impact upon the employees who would be affected. This ignores other factors involved. For instance, indiscriminate combination of the two services in one tour of duty would lead to confusion in the application of bidding, assignment, and pay rules.

The Organizations resist the Carriers' proposal on the ground that the entire field should be left to local collective bargaining. There are, however, a number of factors which inhibit local collective bargaining on this subject. One of the paramount difficulties is the pattern of representation of train and engine service employees. Frequently, four or five organizations represent the operating employees. It is most unusual to find only one or two organizations representing them. It has already been seen that there has been little progress with respect to this problem on the national level when less than all of the organizations affected are involved in the same movement. Similar difficulties are encountered on the local level. As a practical matter, of course, it avails little to reach agreement with one group

of operating employees in this area when the other groups are unwilling to enter into similar agreements. Another factor which inhibits local collective bargaining in this area is the adoption of national or constitutional policies regarding the separation of road and yard service by some of the organizations.

We are convinced that a national rule governing the work which road crews may perform in yards is necessary. A rule should be established which affords the Carriers a more uniform and flexible operation consistent with the recognition that there are either separate seniority rights to road work and yard work or other rights dependent upon some sort of separation between the two services. For all practical purposes, this also requires a recognition of the principle that the work functions of the two services cannot be so completely compartmentalized under all circumstances as to prohibit employees [177] in one of the services from performing the same kind of work which employees in the other perform. In other words, it should be accepted that there are gray areas in the work required in yards where, under certain circumstances, either road crews or yard crews may be used to perform the same type of work without penalty.

The statement of the principle is somewhat easier than its implementation. The provisions of the rule should be based upon a rule of reason. It should be recognized that the prime function of the road crew is to get the train over the road and that of the yard crew is to classify and put the train together. Recognition should, however, be given to the fact that there is switching work which reason and necessity dictate should be performed by road crews as an incidental part of their day's work. Naturally, the amount and extent of such work should vary in accordance with whether or not

yard crews are employed at given locations. Greater freedom should be afforded the carriers to use road crews in switching where yard crews are employed but not on duty than where yard crews are on duty. There should be little or no restriction on the work which road crews may perform in yards where there are no yard crews employed.

Discontinuance of Yard Engine Assignments. Experience under the present national rule which expresses general principles and refers specific cases to local bargaining for resolution indicates the need for a new national rule prescribing conditions under which the carriers may discontinue the last remaining yard engine at a given location or on a given shift. We do not wish to imply that local collective bargaining on this subject has been totally ineffective. A number of local agreements on this subject have been negotiated. On these properties both parties commendably realized that where switching requirements are substantially reduced the carrier should have the freedom to abolish yard assignments and permit road crews to perform switching without additional payment either to the road crew performing the work to to any yard crew. In these agreements varying standards have been used to determine the extent to which the yard service requirements must diminish before the carrier may abolish the yard assignments—a preponderance use a standard of 4 hours averaged over a specified number of days. This appeals to us as a reasonable standard which should be applied in two ways: first, in determining when the carriers should have the right to discontinue yard engine service and in determining when the carriers should reestablish such service; second, the standard should be applied not only to the discontinuance of last yard engine assignments at a given yard but to the discontinuance of such assignments on any shift in yards where two or more shifts of yard engines are assigned. [178]

RECOMMENDATIONS

In the light of the foregoing, it is recommended that the parties negotiate a national rule which will incorporate the following:

1. Provision should be made that, regardless of whether yard crews or hostlers are employed or are on duty, road crews may be required (a) to accompany or handle engines of their own trains from engine facilities or ready tracks to departure tracks or from arrival tracks to engine facilities or ready tracks, (b) to switch out defective or "no bill" cars from their own trains, (c) to handle cabooses of their own trains and to exchange cabooses from one train to another, provided the road crew handles either train into or out of the terminal, (d) to pick up or set out cars of their own trains as required from or to the minimum number of designated tracks which could hold the same, and (e) to pick up or set off cars which are part of the road train consist in more than one yard in consolidated terminals subject to reasonable restrictions concerning the maximum number of such yards.

Such provision should further make it clear that where yard crews are not on duty road crews may be required to perform all of the work enumerated in a, b, c, d, and e above and in addition may be required to handle all switching in connection with their own trains. It should further be made clear that road crews operating in other than through freight or passenger service where yard crews are not on duty may be required to perform any switching or station work.

Provision should further be made that carriers will not arbitrarily transfer switching work to road crews which normally would be performed by yard crews, e.g., trains should not be made up so that switching normally performed at points where yard crews are on duty is required on line of road.

Provision should further be made that road crews are not entitled to any additional compensation other than that contemplated by the basic day, initial and final terminal delay, and conversion rules for the performance of the above services and that no yard crew or hostlers shall have any claim by reason of the road crew engaging in such work.

2. Provision that, where more than one shift of yard assignments is worked and yard service requirements during the period of assignment of a given shift diminish to the extent that less than an average of 4 hours' yard work is required on that shift over a period of 10 consecutive working days, the last remain- [179] *ing assignment on such shift may be abolished. Conversely, when yard service requirements increase to the extent that over a period of 10 consecutive working days an average of more than 4 hours of yard work must be performed within a period of time constituting a normal work shift, the yard assignment shall be reestablished.*

Where only one yard assignment remains in a given yard and yard service diminishes to the extent that less than an average of 4 hours' yard work remains to be performed on that assignment over a period of 10 consecutive working days that assignment may be abolished. Conversely, when yard service requirements increase to the extent that an average of 4 hours' yard work is required over a period of 10 consecutive working days within an 8-hour period, the assignment shall be reestablished.

Time spent by road crews in performing the services enumerated in the first paragraph of 1, above, shall not be counted in computing the 4-hour average. Provision should also be made that when yard service assignments are abolished under these conditions yard crews should be considered as "not on duty." [180]

Appendix C

NATIONAL MEDIATION BOARD

WASHINGTON

AGREEMENT TO COVER LIST OF ELIGIBLE VOTERS

involving

Case No. R-3680, Representation Dispute Among Yardmen (Foremen, Helpers, Switchtenders and Car Retarder Operators)

Employees of

Southern Pacific Company (Atlantic & Pacific Lines)

The undersigned parties to representation dispute among Yardmen (Foremen, Helpers, Switchtenders and Car Retarder Operators) employees of the Southern Pacific Company (Atlantic & Pacific Lines) have inspected and hereby agree to the list of eligible voters to be used in conducting the election by the National Mediation Board in its Case File R-3680, as prepared by Mediator Luther G. Wyatt.

It is agreed that changes in the eligible list of voters as referred to herein will be made only to correct error. Only those employees shown on the eligible list will be permitted to vote, except that upon proof of error in list, such error will be corrected.

Signed at San Francisco, Calif., this 23rd day of September, 1964.

For Switchmen's Union of North America
By: /s/ JOHN R. BURGE, *General Chairman*
By: /s/ GEO. CLARK, *Vice President*

For Brotherhood of Railroad Trainmen
By: /s/ R. B. ZIMMERMAN, *Gen. Ch.*
By: .....

Witnessed:
/s/ LUTHER G. WYATT
Mediator, National Mediation Board

Appendix D

NATIONAL MEDIATION BOARD
WASHINGTON

Case No. R-2753 Case No. R-2763 Case No. R-2805
June 11, 1954

In the matter of
REPRESENTATION OF EMPLOYEES
of the
SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, OREGON ELECTRIC RAILWAY, OREGON TRUNK RAILWAY
(1) Road Conductors, (2) Road Brakemen (3) Yardmen (Foremen, Helpers & Switchtenders)

FINDINGS UPON INVESTIGATION

On July 23, 1953, the Order of Railway Conductors (hereinafter referred to as the ORC), filed an application pursuant to Section 2, Ninth, of the Railway Labor Act, for the investigation of an alleged representation dispute among road brakemen, employed by the Spokane, Portland & Seattle Railway Company, the Oregon Electric Railway and the Oregon Trunk Railway (hereinafter referred to as the carrier. The three properties named are operated as a single unit). At that time these road brakemen were represented by the Brotherhood of Railroad Trainmen (hereinafter referred to as the BRT). This application was subsequently docketed as Case R-2753.

On August 26, 1953, the BRT filed an application for the investigation of an alleged representation dispute among road conductors employed by the above named carrier. At

that time the road conductors were represented by the ORC. This application was docketed as Case R-2763.

Also on August 26, 1953, the BRT filed an application for the investigation of an alleged representation dispute among yardmen employed by the carrier. At that time yardmen (yard foremen, helpers and switchtenders) in four yards of the carrier were covered by an agreement between the carrier and the BRT, these yards being located at Portland, Oregon; Vancouver, Washington; Astoria, Washington; and St. Helens, Oregon, and being known as "closed" yards.

At seven other locations, namely, Salem, Oregon; Albany, Oregon; Eugene, Oregon; Sweet Home, Oregon; Portland, Oregon; Electric Division Yard; Wishram, Washington and Bend, Oregon, these locations being known as "open" yards, the carrier employs men classed and paid as yardmen, but whose jobs are filled from the road conductors' and road brakemen's seniority lists. The representation of the men employed by the carrier on yard assignments at these locations is in dispute. This application was docketed as Case R-2762. [1]

Mediator Lawrence Farmer was assigned to investigate these three cases. His investigation commenced September 19, 1953, and was recessed September 25, 1953. During this investigation, the representatives of the ORC contended that all men assigned to the yard assignments in the seven so called "open" yards are not yardmen but are roadmen because no yardmen's seniority rosters, as such, exist in these "open" yards, and the yard foreman's vacancies are filled from either the road conductor's or road brakemen's seniority lists, while vacancies as yard helpers in these yards are filled from the road brakemen's seniority rosters.

Tentative eligible lists of road conductors, road brakemen and yardmen, system wide, were prepared by the carrier at the request of the mediator, showing men holding regular assignments, men on extra boards, and those working a preponderance of service for 30 days previous to the last payroll period, each in the three classes mentioned. After these lists had been prepared, the ORC representative contended that the men shown assigned as yard helpers in the "open" yards should be included in the road brakemen's list, Case R-2753, also that the men shown assigned as yard foremen in the "open" yards should be included on the road conductor's list, Case R-2763. The ORC admitted these men assigned in the "open" yards as yard foremen and yard helpers are being paid yard rates and are working under the yard rules carried in the joint agreement of April 1, 1925, between the carrier, the ORC and BRT; nevertheless, they contend these men are roadmen and not yardmen for the reason they hold no yard seniority as such.

The ORC representative advised the mediator on September 24, 1953 that they (ORC) did not desire to participate in an election among the yardmen of this carrier. On the strength of that statement, the BRT addressed a letter to the Mediator on September 24, 1953, withdrawing their application in Case R-2762, and that case was closed.

The BRT representative contended, in opposition to the position of the ORC, that eligible lists should be prepared on the basis of preponderance of service as road conductors, road brakemen and yardmen, as has been the Board's usual practice. Investigation was recessed on September 25, 1953 for Board consideration of the contentions of the two organizations. On October 6, 1953, the ORC was advised that the Board had considered their contentions and had found no reason to deviate from its practice of many years to establish eligible lists on the basis of preponderance of service

worked in the various crafts, and that a mediator would be assigned to complete the investigation of the two remaining open cases. On October 8, 1953, President Hughes of the ORC protested this ruling, and requested a formal public hearing on the issues raised by the ORC.

On January 8, 1954, the BRT requested the reinstatement of their application of August 26, 1953, for investigation of dispute on representation of yardmen, R-2762. This application was re-docketed as [2] this Board's Case R-2805 on January 11, 1954. On January 19, 1954, the Board ordered a public hearing to be held on the issues covered in Cases R-2753, R-2763 and R-2805. This hearing was held in Portland, Oregon, beginning at 10:00 a.m., January 26, 1954, and running through January 29, 1954, before Mediator Lawrence Farmer, as Hearing Officer, at which time all interested parties were permitted to present evidence in support of their contentions. At the invitation of the Board, a representative of the carrier was present for the purpose of supplying such factual data as might be requested.

ISSUES

The issues in Case R-2753, representation of road brakemen, R-2763, representation of road conductors, and R-2805, representation of yardmen, may be summarized as follows:

The ORC contends that approximately 54 brakemen assigned and working as yard helpers in the so called "open" yards, and all other brakemen on the road brakemen's seniority rosters are entitled to vote in any election held among road brakemen on this carrier.

The ORC also contends that approximately 23 conductors assigned and working as yard foremen in the so called "open" yards, and all other conductors on the road conductors' seniority rosters, are entitled to vote in any election held among road conductors on this carrier.

The BRT, on the other hand, contends that only those men who have worked a preponderance of their time in road service are entitled to vote as either road conductors or road brakemen; further, that road conductors and road brakemen, when engaged in yard service in the so called "open" yards on this carrier, are paid under yard rates, rules and working conditions and therefore are in a separate craft or class from men engaged in road service, viz., yard service; further, that men engaged in yard service a preponderance of their time should be voted as yardmen; those working a preponderance of their time in road service to be voted as either road conductors or road brakemen.

The ORC contention in effect is that there are no yardmen as such employed by this carrier except in the four "closed" yards; that all other men in train service, including those assigned and working as yardmen in the "open" yards, are roadmen.

FINDINGS OF FACT

The Spokane, Portland & Seattle Railway Company, Oregon Electric Railway Company and Oregon Trunk Railway is a carrier within the meaning of Section 1, First, of the Act. The employees involved in this case are employees as defined in Section 1, Fifth, of the Act. [3]

Section 2, Fourth, of the Act states:

> "Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

Section 2, Ninth, of the Act states:

> "Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such

employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. . . In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."

DISCUSSION

The Mediator's investigation developed from information furnished him by the carrier in September 1953 that the carrier then had the following numbers of men assigned to the classes of work indicated:

	Road Conductors	Road Brakemen
Astoria Division	7	21
Vancouver Division	39	112
Oregon Electric Division	12	25
Total	58	158

The total of 158 road brakemen includes a number of men on the brakeman's extra list. There are no extra boards maintained for road conductors. The carrier also reported the following number of men regularly assigned to yard service at that time: [4]

	Yardmen
Portland, Oregon Yard	76
Vancouver, Washington Yard	64
Astoria, Oregon Yard	3
St. Helens, Oregon Yard	4
Salem, Oregon Yard	8
Albany, Oregon Yard	9
Eugene, Oregon Yard	5
Sweet Home, Oregon Yard	3
Wishram, Washington Yard	17
Bend, Oregon Yard	9
Portland, Oregon, OE Yard	5
Total	203

In addition, the carrier reported that 14 other men had performed the preponderance of their time during the period August 16 to September 15, 1953 in yard service, this service being performed by men working in the so called "open" yards, making a total of 217 men in yard service during the period mentioned.

The yards at Portland, Vancouver, Astoria and St. Helens are commonly referred to on this carrier as the "closed" yards. Yardmen in those four yards are represented by the BRT under a schedule for yardmen effective December 1, 1952. Road conductors and brakemen have interchangeable rights with the yardmen in the Astoria and St. Helens yards these men also having rights to road service. This arrangement, however, does not affect the representation of yardmen in these two yards, which remains with the BRT under the December 1, 1952 agreement.

The testimony during the hearing showed that the men in yard service in the seven so called "open" yards are covered by the joint agreement effective April 1, 1925 between the carrier and the ORC and BRT. It was testified, without contradiction, that the men in yard service in these

seven yards are governed by the rates of pay, rules and working conditions specified in Article XIII through XXIII, both inclusive, of that agreement. These Articles cover most of the standard yard service rules, including the 8 hour day, overtime after 8 hours, unit assignment rule for the yard crew, fixed starting time rule for the first, second and third shifts, lunch period rule, designated point for going on and off duty, crew consist rule, extra payment when used in road service in emergencies, etc. It was also testified that road crews are not permitted to perform switching at the points where the "open" yards are established, when yard crews are assigned and are on duty. In general, the testimony showed that the men assigned to yard service in the seven "open" yards are compensated and perform their service in those yards under standard yard rates and working conditions.

There is also in effect an agreement signed February 12, 1948, between the carrier, the ORC and the BRT, governing the selection of personnel for the yard assignments at Wishram, Washington and Bend, [5] Oregon, placing these assignments under Articles XIII to XXIII, both inclusive, of the joint agreement of April 1, 1925, above referred to, and providing that such assignments will be bulletined and assigned on July 1 and January 1 of each year, and when bid in, the bidders can neither be displaced by senior men nor can they vacate such assignments for the six month period except under penalty of remaining on the extra board for the balance of the six-month assignment.

The carrier representative testified during the hearing that the foremen in all the yards on the property are reported to the Interstate Commerce Commission under Reporting Division 119, Yard Conductors (Foremen); also that all helpers in their yards are shown under Reporting

Division 120, Yard Brakemen (Helpers). The difference between road work and yard work has been recognized on this carrier for a great many years. The earliest contract quoted by the carrier representative at the hearing showing a distinction between road and yard work was dated March 1, 1914. Although the ORC witnesses in the hearing consistently refused to admit that the men assigned to yard work in the "open" yards have interchangeable road and yard rights, they referred a great many times to "yard service" as defining the work performed by the men holding such assignments in these yards. There seemed to be no difference of opinion between the two organizations that there is a clear and definite distinction between road service and yard service. The ORC contention was primarily that the men doing yard work in the "open" yards are roadmen, because they hold seniority only as roadmen and there is no yard seniority as such for the men working in these yards.

Yard service has been recognized for a great many years on the majority of rail carriers as a separate occupational classification and has on many occasions in the past been held by this Board to constitute a separate craft or class for representation purposes under the Railway Labor Act. The differences in the duties of road trainmen and men in yard service was fully described in the *Classification and Index of Steam Railroad Occupations*, issued by the United States Railroad Labor Board in 1921. These four occupational classifications and their descriptions are as follows:

> *Yard Conductor or Yard Foreman:*
> ". . . . positions in which the duties of incumbents are to supervise and assist the work of switchmen and helpers in yard switching and yard work train service, including supervision of the breaking up and making up of trains; and to perform related work." (Page 257)

Yard Brakeman or Yard Helper, Switchtender:
". . . positions in which the duties of incumbents are to couple, uncouple and ride cars in connection with the breaking up and making up of trains; to handle switches; and to perform related work in connection with yard switching or switch tending service." (Page 208) [6]

Road Freight Brakeman or Flagman:
". . . . positions in which the duties of incumbents are to assist conductors in the operation and protection of freight trains; and to perform related work." (Page 257)

Road Freight Conductors:
". . . . positions in which the duties of incumbents are to have charge of the operation of freight trains en-route and at stations, between terminals; and to perform related work." (Page 256)

During the early years of this Board's experience, questions of employees with dual or interchangeable seniority, the voting of men who worked part time in two crafts or classes, and the specific question of whether yardmen (yard foremen, helpers and switchtenders) are a separate craft or class for the purpose of the Railway Labor Act, came before the Board for decision on many occasions. The following excerpts from some of the Board's earlier decisions, a number of which were reviewed and sustained by judicial authorities, bear particularly on the issues in the instant cases.

In its findings in Case R-276, decided August 13, 1937, representation of train and yard service of the Oklahoma Railway, the Board laid down the general principle that agreement coverage has no bearing on the determination of representation by craft or class in the following language:

"Further, the right of selection of representative by each craft or class is quite independent of any existing

agreement. No limit is placed in the law upon the right of a craft or class to select its representative and that right cannot be curtailed or limited by any existing agreement."

In the Board's findings in Case R-290, decided July 14, 1938, representation of road conductors, yard foremen, helpers and switchtenders, Pittsburgh & Lake Erie Railroad Co., the Board said:

"On most of the railroads in the United States yardmen constitute another such craft or class. It includes yard foremen or yard conductors, yard brakemen or yard helpers and usually also switchtenders."

And further in those findings the Board stated:

"In all elections held by the Board subsequent to 1935, the Board has uniformly treated yardmen as a single craft or class in accordance with the general practice as it existed on the railroads of the country prior to 1935." [7]

Still further in those findings, the Board made the following statements, which are particularly pertinent to the instant disputes:

"In view of all circumstances of the present case, as well as the customary practices and established precedents, the National Mediation Board is of the opinion that the yard foremen or yard conductors do not constitute a craft or class within the meaning of the Railway Labor Act. They are but a part of the craft or class of yardmen or switchmen which by long-established custom and practice includes all of the yardmen, including the switchtenders whose status of yardmen on this railroad is not questioned. All employees regularly assigned to service as yardmen are entitled to participate in the election and, as in the case of the road conductors, such unassigned extra men as devote

a preponderant amount of service to yard work are also eligible.

"The interchangeable duties of the employees in the various classes of service and the use of the 'Common Extra Board' on this railroad make it extremely difficult to distinguish the crafts or classes of employees for purposes of representation under the Railway Labor Act. As suggested above the contesting organizations might be best advised to agree to vote all the employees involved in the dispute as a single craft or class. But in view of the provision of the Act that each craft or class shall have the right to designate representatives, it is the judgment of the Board that the facts in the case establish that the representation of two crafts or classes of employees are in dispute:

1. Road Conductors.
2. Yardmen (foremen, helpers and switchtenders)"

On the subject of double voting in representation disputes and the manner of determining the craft or class in which a man will vote based on the preponderance of his service in a definite checking period, the following quotation from the Board's findings in Case R-125, decided October 11, 1935, representation of road conductors, Norfolk & Western Railway Co., outline specifically the Board's policy in these matters, which has remained unchanged throughout the years:

"Yard service employees may have seniority rights as road men and vice versa. Engineers and firemen also accumulate seniority in both crafts concurrently. Nevertheless, the established and recognized practice has been to vote employees only in the one craft in which they are employed at the time that an election is held. Any other practice would mean multiple voting and multiple representation, and would obliterate the lines between the crafts or classes which Section 2, Fourth and Ninth, clearly intend should be maintained." [8]

"The Board is of the opinion that the Railway Labor Act authorizes no such double voting. It has uniformly ruled that employees may vote in one craft or class only, and all its elections have been conducted accordingly. The first annual report of the Board referred to its rulings in these words:

> 'It has been claimed occasionally * * * that employees who have seniority rights in several crafts or who work interchangeably in more than one craft should have a vote in each craft in which they may thus have an interest. The Board has felt that the Act intended each employee to vote in one class or craft only, and has uniformly ruled accordingly, following a decision of United States District Judge Gordon in a case that arose on the Georgia & Florida Railroad.[3]'

> ". . . It is common practice on all railroads for certain employees to perform part-time service in more than one craft. When they thus work part-time in two crafts, it customary to classify them for voting and representation purposes in the craft or class where they work a preponderant amount of time during a representative period. The reasonableness of this practice is attested to by many voluntary agreements made between employees' organizations involved in representation disputes. The most recent of these mutual agreements made by the two organizations involved in the present dispute was dated June 2, 1938, to apply as a rule for an election on the Boston & Albany Railroad.[5] In contested cases the Board has uniformly followed the same practice.

The ORC contended that on many railroads switching operations in so-called small yards where no yard engines are assigned and certain industrial switching work is done by road crews, and is not considered to be work generally

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3. First Annual Report, p. 22."

5. Cases R-452 and R-460."

assigned to men employed in the yardmen's craft or class. In support of their contentions, they referred to the following cases:

R-1280—Representation of Road Conductors, Baltimore & Ohio RR

R-1324—Representation of Road Conductors, Chicago & North Western Ry.

R-1629—Representation of Road Conductors, Atlantic Coast Line RR

R-1655—Representation of Firemen & Hostlers, Bush Terminal RR

R-1775—Representation of Road Conductors, Int'l Great Northern RR

R-1785—Representation of Road Conductors, Northern Pacific RR

R-1813—2175, 2611, Representation of Road Conductors, Clinchfield RR

R-2457—Representation of Road Conductors, Erie RR

R-2530—Representation of Road Conductors, New York Central RR

R-2721—Representation of Road Conductors, Colorado & Southern Ry. [9]

The files in each of the above cases have been examined. It was noted that in each and every one of these cases, the list of eligible voters was established by agreement between the organizations without the necessity of the Board passing upon any such questions as those raised by the ORC in the present cases. It was further noted in this examination of the above files that the crews referred to by the ORC are those performing switching at intermediate points and locations where no yard crews are regularly assigned. Such crews have always been considered to be in road service, some of them on certain roads being referred to as road switchers, roustabouts, or road dodgers, and in the main, those crews are paid local freight rates. In some few cases,

by negotiated agreement, crews performing such service receive yard rates, but they are still considered to be in road service. This situation applies particularly to the crews working out of Willbridge, on the Spokane, Portland & Seattle Railway.

It is clear to the Board that the commonly accepted distinction between road and yard service prevails on the Spokane, Portland & Seattle Railway and its operated subsidiaries; further, that the crews regularly assigned to yard switching work at the seven locations now referred to as "open" yards are in fact and in name also yardmen; that they are paid yard rates of pay and work under special yard rules in the joint agreement of April 1, 1925 between the carrier, the ORC and the BRT. In other words, they belong to the craft or class of yardmen, as above defined, and they are not roadmen. Accordingly, the Board has reached the following—

CONCLUSIONS

On the basis of the entire record in these cases, the National Mediation Board finds that representation disputes exist among the employees of the carrier in the three following crafts or classes:

(1) Case R-2763, Road Conductors;
(2) Case R-2753, Road Brakemen, including Flagmen and Baggagemen;
(3) Case R-2805, Yardmen, including Yard Foremen, Yard Helpers and Switchtenders.

The craft or class of yardmen in Case R-2805 will include all men employed as yard foremen, yard helpers and switch tenders and who work under either the yardmen's agreement of December 1, 1952 or under the provisions of Articles XIII through XXIII of the joint agreement between the

carrier, the ORC and the BRT, effective April 1, 1925, wherever employed.

The eligible lists of employees in the three crafts or classes named above shall include all employees regularly assigned as (1) road conductors, (2) road brakemen, and (3) yardmen, as of June 1, 1954, and [10] also those employees who have worked a preponderance of their time in each of the three crafts or classes during the period April 1, 1954 through May 31, 1954. The usual provisions relative to men on sick leave, authorized leave of absence, extra and furloughed employees, men in military service, and men drawing total and permanent disability who are under the age of 65, will govern in the preparation of the three eligible lists.

A Mediator will be assigned to conduct an election among each of the three crafts or classes at an early date.

By direction of the NATIONAL MEDIATION BOARD.

E. C. Thompson
Secretary [11]

Appendix E

Submission to NRAB of SUNA

File No.....

Docket No. .....

Ex Parte Submission

Before the National Railroad Adjustment Board

Parties to Dispute } Switchmen's Union of North America
Southern Pacific Company (Pacific Lines)

STATEMENT OF CLAIM:

Claim is made for one day's pay at the yard rate of payment applicable for the senior switchman standing for service at Los Angeles Yard, Los Angeles Division, when brakemen were permitted to perform yard service as follows:

1960 Date	On Duty Time	Yard Job Worked	Brakeman Used
2/17	11:59 PM	524	Lee Roberts
2/17	11:59 PM	524	G. W. Gallagher

* * * * * * *

[1]

STATEMENT OF FACTS:

Under the Yard Agreement in effect on the Southern Pacific (Pacific Lines), prior to September 14, 1959, agreement rules were in effect to permit brakemen to transfer to yard service on a temporary basis when such brakemen desiring to transfer could not work fifty (50) per cent of the time in road service. The provisions permitting the use of brakemen read as follows:

"ARTICLE 23

Section (a). Yard employes will have no rights in train service and vice versa, but if temporarily employed, they will not lose their rights within sixty (60) days.

Note: 1—The loss of seniority after sixty (60) days will not apply to switchmen used in train service who, account slack business, cannot work fifty (50) per cent of their time as switchmen; Local Chairman and local officials will determine percentage by checking back for a fifteen (15) day period.

Note: 2—Brakemen who temporarily transfer to yard service account being unable to work fifty (50) per cent of their time in road service, as [3] provided for by Interpretation Agreement TRN 1-299, signed at San Francisco, April 2, 1942, shall take temporary rank on switchmen's consolidated list as of date of first service and shall retain such seniority until released due to the provisions of Article 47, Section (a) and NOTE, Trainmen's Agreement.

In yards where brakemen are temporarily working under the provisions of this Article, if switchmen junior in seniority to such brakemen are unable to work ten (10) shifts in a two-week period in that yard, Superintendent or his authorized representative, at request of the Local Chairman, SU of NA, will remove sufficient brakemen from the working list in that yard prior to the expiration of the fifty-nine (59) day period in reverse seniority order to the extent necessary to enable such junior switchmen to work, if possible, at least ten (10) shifts in a two-week period. To determine the time worked by such junior switchmen, Local Chairman, SU of NA, and authorized representative of the Superintendent will check back for the two weeks immediately preceding 12:01 A.M., Monday of the week in which Local Chairman, SU of NA, makes the request.

(See YDM 1-78 and TRN 1-299, Appendix B.)"

"YDM 2-7

Mr. R. J. Brooks
General Chairman, BRT,
Pacific Building,
San Francisco, Calif.

December 1, 1939

Dear Sir:

This letter will confirm understanding reached with respect to the application of each the Trainmen's Agreement which becomes effective December 16, 1939, excluding former El Paso and Southwestern Railroad, and the Yardmen's Agreement which becomes effective November 16, 1939, excluding former El Paso and Southwestern Railroad, respectively. The understanding was, that:

In view of the fact that the General Committee of the Brotherhood of Railroad Trainmen is authorized to and represents the two classes of employes, i.e., trainmen [4] and yardmen, employed on the Southern Pacific Company (Pacific Lines), and the further fact that the agreements herein referred to for those two classes of employes were negotiated by said General Committee, it is mutually agreed that none of the provisions of the Trainmen's Agreement, which becomes effective December 16, 1939, shall be construed by either party as being in conflict with any provisions of the Yardmen's Agreement, which became effective November 16, 1939; likewise, no provision of the Yardmen's Agreement, which became effective November 16, 1939, shall be construed by either party as being in conflict with any provisions of the Trainmen's Agreement effective December 16, 1939.

If you concur, please signify your acceptance in the space provided herein.

Yours truly,
(Signed) R. E. Beach
Assistant Manager of Personnel
Southern Pacific Company

ACCEPTED:
(Signed) R. J. Brooks
General Chairman
Brotherhood of Railroad Trainmen"

"TRN 1-299

INTERPRETATION AGREEMENT

This Agreement between the Southern Pacific Company (Pacific Lines) and the Brotherhood of Railroad Trainmen, constitutes an interpretation of Article 47, Section (a) and Note, of the Trainmen's current Agreement, reading as follows:

'Section (a). Yard employes will have no rights in train service, and vice versa, but if temporarily so assigned shall not lose their rights therein within sixty (60) days.

NOTE: The above not to apply to trainmen used in yard service, who, account slack business, are unable to work 50% of the time as trainmen. Local Chairmen and Local Officials shall determine percentage by checking back for a period of fifteen (15) days.' [5]

"Item 1:

Trainmen desiring to temporarily transfer from train service to yard service will make application, in writing, to Superintendent, and, if approved, the following will govern:

Item 2:

Application will not be approved if check shows that for the last 15 consecutive days preceding the date of application the trainman could have worked 50% of those days in train service on the seniority district from which he desires to transfer.

Item 3:

Trainmen who transfer to yard service under Item 1, will take seniority rank on the yardmen's division seniority roster as of the date of first service and will retain such seniority until released under the provisions of Article 47, Section (a) and Note, Trainmen's current Agreement.

Item 4:

If a trainman who transfers under Item 1, desires to make a permanent transfer to yard service on the division to which temporarily transferred, and provided same is approved by Superintendent or Superintendents involved, seniority rank on the switchmen's division seniority roster will be as of 12:01 A.M. of the date transfer is approved.

If additional yardmen are hired on the division during the period the trainman is being used in yard service, men so hired will be junior to the trainman who transferred under the provisions of Item 1; however, when working list is reduced, the trainman or trainmen will be first reduced in reverse seniority order, unless they have permanently transferred to yard service under the provisions of this Item.

Item 5:

Superintendents will furnish Local Chairmen, BRT, having jurisdiction over trainmen and yardmen, the names and seniority date of trainmen who transfer to yard service, either temporarily or permanently.

Item 6:

This interpretation Agreement becomes effective April 22, 1942, and cancels any other interpretation of Article 47, Section (a) of the Trainmen's current Agreement, with which it conflicts. [6]

"Signed at San Francisco this 2nd day of April, 1942."

(Signatures not reproduced)

On October 1, 1957 the duly authorized representatives of the class and craft of employes covered by the yard agreement involved herein served a Section 6 Notice under the application of the Railway Labor Act, asking and demanding a change in rules in part as follows:

"COMPANY FILE YDM 2-7 OF DECEMBER 1, 1939, IS CANCELLED INSOFAR AS IT PERTAINS TO THE CHANGES HEREIN INDICATED."

"Article 23, Section (a)

(Cancel Present 23(a) and Substitute:)

Yard employes will have no rights in train service and vice versa, but if switchmen are temporarily employed in road service, they will not lose their rights within sixty (60) days.

Note: The loss of seniority after sixty (60) days will not apply to switchmen used in train service who, account slack business, cannot work fifty (50) per cent of their time as switchmen; Local Chairman, SUNA, and local officials will determine percentage by checking back for a fifteen (15) day period."

The employes' notice to cancel the old Article 23, with its reference and application to brakemen being permitted to work in yards where the yard agreement was applicable, and adopt a new Article 23 eliminating provisions for brakemen to work in the yard, was handled under the provisions provided for by the Railway Labor Act. In mediation proceedings being held on the property during August of 1959 it was agreed the new rule as proposed would be granted. Subsequently, and on September 14, 1959 the new Article 23, Section (a) became effective. With cancellation of the old Article 23(a) and adoption of the new, the parties removed from the yard agreement the provisions that had been in effect for a long number of years permitting brakemen to transfer to service arising under the yard agreement, establish a temporary seniority date, and work in accordance therewith.

At times and dates shown in statement of claim the carrier permitted brakemen to be used in yard service on jobs indicated. All of the employes named in statement of claim

had previously established seniority dates as brakemen in the carrier's service. All of the employes so named retained their prior seniority dates as brakemen while they were being used in yard service as indicated, and their seniority as brakemen continued to accumulate while they were being used in yard service. [7]

At the conclusion of their use in yard service (March 16, 1960) all of the employes named in statement of claim were recalled to service on the brakemen's board with their prior seniority date as brakeman applicable to each.

A claim was entered, consistent with the statement of claim herein, and was denied, except that a claim entered and handled to a conclusion on the property included the name, and service performed by another employe (R. M. Collins) who was a switchman properly transferred to the Los Angeles Yard for service. The service performed by R. M. Collins during the period involved in this claim is, therefore, removed from the claim in the presentation now made.

Employes Position:

A Yard Agreement covering Rates of Pay and Rules, in effect on the dates of this claim is on file with the Board and is hereby made a part of this submission. Directly involved herein are the following rules:

"ARTICLE 2

Section (a). Eight hours or less shall constitute a day's work."

"ARTICLE 12

Section (b). The senior switchman in point of service will have the choice of engines."

"ARTICLE 23

Section (a). Yard employes will have no rights in train service and vice versa, but if switchmen are temporarily employed in road service, they will not lose their rights within sixty (60) days.

> NOTE: The loss of seniority after sixty (6) days will not apply to switchmen used in train service who, account slack business, cannot work fifty (50) per cent of their time as switchmen; Local Chairman, SUNA, and local officials will determine percentage by checking back for a fifteen (15) day period."

It is the employes' position in this case that the carrier improperly permitted brakemen to work in Los Angeles Yard at times and dates of claim; that there was no provision in the yard agreement to permit the use of such employes, *account such permissive rules had been removed from the yard agreement some five (5) months previous;* (see employes facts); therefore, the use of the brakemen as switchmen in yard service violated the provisions of the yard agreement heretofore reproduced. Accordingly, the claims should be sustained in line with binding yard settlements and Special Board Awards applicable to circumstances where brakemen are used in yard service. [8]

Attached as the Employes Exhibit "A" is a copy of Decision No. 1405, Special Adjustment Board No. 18, which decided a yard claim arising under the yard agreement rules in effect on this property. In Decision 1405 the Special Board considered a claim of the senior switchman standing for service performed by a brakeman *who had not properly invoked the provisions of Article 23, Section (a) of the yard agreement so that he could be properly used in yard service.* A brief review of Exhibit "A" reveals the following:

> "Brakeman Frost had not made application in writing to temporarily transfer to yard service as provided by TRN 1-299."
>
> ". . . yardmen . . . *were within the meaning of the rules of agreement and interpretation thereof to be considered available for the service performed by Brakeman Frost;* and Brakeman Frost was therefore

improperly used to the exclusion of available yardmen *and in violation of the rules, interpretations and understandings.*" (Emphasis added)

It follows that the yard agreement rules prohibit the use of brakemen to perform yard work *unless procedures are followed which properly permit brakemen to work in yard service.* And where such procedures have been removed from the yard agreement, and thus are no longer available for application, any use of brakemen is contrary to the yard rules.

Attached as the Employes Exhibit "B" is a reproduction of the handling leading to settlement of claim covered by the carrier's file 148-3173. Sheets 1 and 2 of Exhibit "B" reproduce the General Chairman's (SUNA) letter of November 5, 1954, file Sac-73; sheets 3 and 4 reproduce the carrier's letter of December 13, 1954, file YDM 148-3173 wherein reasons for initial denial of the claim are set forth, and sheet 5 shows that the claim was disposed of by settlement adjustment, on the basis that the brakemen were improperly used to perform the yard service over the period of time involved.

Attached as the Employes Exhibit "C" is a photostatic copy of carrier's records showing the dates the brakemen employes herein transferred to the Los Angeles Yard board as "*loaners*" and the dates the same employes were "*Recalled to Brakemen's Board.*"

The Board will note that Sheet 1 of Exhibit "C" lists S. R. Albrecht, V. W. Enderle, G. W. Gallagher, N. D. Hollis, R. B. Moore, J. E. Richcreek, Lee Roberts and G. D. Spainhower all as *loaners.* "Loaners" is a term applied to brakemen employes who are "loaned" from the brakemens board. The Board will also note on sheet 1, the date such brakemen marked upon the yard board. [9]

Sheet 2 of Exhibit "C" shows the date *these same employes* were *recalled to the brakemen's board.* The instant claims all arise during the period of time these same brakemen employes of the carrier performed yard service at the carrier's Los Angeles Yard.

All data and argument herein has been presented to carrier and discussed in conference as required by the Railway Labor Act as amended. Oral hearing is waived.

We, therefore, request a sustaining award in this claim.

Respectfully submitted,

/s/ John R. Burge

John R. Burge, General Chairman
Switchmen's Union of North America
Southern Pacific Co. (Pacific Lines)
268 Market Street—Room 333
San Francisco 11, California

cc—Mr. K. K. Schomp
Manager of Personnel
Southern Pacific Company
65 Market Street
San Francisco 5, Calif. [10]

Submission to NRAB of Southern Pacific

Docket No.....

Before the National Railroad Adjustment Board

First Division

In the Matter of

Switchmen's Union of North America

vs.

Southern Pacific Company (Pacific Lines)

* * * * * * *

STATEMENT OF CLAIM:

"Claim is made for one day's pay at the yard rate of payment applicable for the senior switchman standing for service at Los Angeles Yard, Los Angeles Division, when brakemen were permitted to perform yard service as follows:

1960 Date	On Duty Time	Yard Job Worked	Brakeman Used
2/17.....	11:59 PM	524	Lee Roberts
2/17.....	11:59 PM	524	G. W. Gallagher

[1]

* * * * * * *

(The above-quoted statement of claim is the same as that contained in the ex parte submission of the Switchmen's Union of North America; it is used solely for identification and its use does not constitute an adoption thereof.)

The Southern Pacific Company-Pacific Lines (hereinafter referred to as the carrier), in response to notice by First Division, National Railroad Adjustment Board, that the Switchmen's Union of North America (hereinafter referred to as the petitioner) has filed an ex parte submission, and

request that the carrier file its answer in the matter of the above claim, respectfully submits the following: [3]

CARRIER'S STATEMENT OF FACTS

1. An agreement effective September 1, 1956 (hereinafter referred to as the "current agreement"), covering wages and working conditions of carrier's yard service employes, hereinafter referred to as "switchmen", has been filed with this Board and is hereby made a part of this submission.

2. Prior to November 26, 1951, the Brotherhood of Railroad Trainmen was the authorized collective bargaining agent of carrier's switchmen; however, subsequent to that date, pursuant to certification by the National Mediation Board, the Switchmen's Union of North America has been the statutory agent of carrier's switchmen.

3. The following individuals were employed as switchmen at Los Angeles on dates shown:

Name	Date 1960
S. R. Albrecht	2/18
V. W. Enderle	2/23
G. W. Gallagher	2/14
N. D. Hollis	2/23
R. B. Moore	2/24
J. E. Richereek	2/24
L. Roberts	2/17
G. D. Spainhower	2/18

Copies of their respective applications for employment as switchmen, prepared individually by them on the above-noted dates, are attached hereto as Carrier's Exhibit "A".

The above-identified individuals thereafter established seniority as switchmen in the same manner as any other person newly employed as such and were used in turn from

the switchmen's seniority extra board or on regular assignments, through exercise of their [4] newly established seniority as switchmen in Los Angeles Yard, as follows:

Switchman S. R. Albrecht

Date 1960	Job No.	Time On Duty
2/18	711	11:59 PM
2/19	716	3:59 PM

* * * * * * *

Switchman V. W. Enderle

2/25	519 (not 791)	11:59 PM
2/29	752	3:59 PM

* * * * * * *

Switchman G. W. Gallagher

2/17	524	11:59 PM
2/18	642	11:59 PM [5]

* * * * * * *

Switchman N. D. Hollis

2/25	792	11:59 PM
2/26	752	3:59 PM

* * * * * * *

Switchman R. B. Moore

2/25	711	11:59 PM
2/26	752	3:59 PM

* * * * * * *

Switchman J. E. Richcreek

2/26	734	3:59 PM
2/29	734	3:59 PM

* * * * * * *

Switchman L. Roberts

2/17	524	11:59 PM
2/18	642	11:59 PM [6]

* * * * * * *

Switchman G. D. Spainhower

2/18	711	11:59 PM
2/25	569	11:59 PM

* * * * * * *

4. The above-named individuals had been in service with carrier as brakemen (for less than two weeks in most instances and prior thereto with the Union Pacific Railroad), but because of insufficient work as brakemen they were cut off from such service and were then reemployed by carrier as switchmen at Los Angeles Yard. When carrier again needed additional brakemen, the above-named individuals had the option of continuing in carrier's service as switchmen, with seniority as such from date so established following their employment as switchmen, foregoing any rights they may have had under the agreement covering carrier's trainmen, represented by the Brotherhood of Railroad Trainmen; or, resigning as switchmen, thereby terminating their seniority and status as such under provisions of the current agreement and accepting service as brakemen. Each of the above named accepted the latter option as of March 16, 1960. [7]

5. Claim was presented and progressed for one yard day at the applicable rate of pay for the senior switchman standing for the service performed each date and time set forth above by the switchman named, based on the premise that brakemen were improperly used in yard service at those times and dates.

POSITION OF CARRIER

No switchman at Los Angeles Yard was deprived of his seniority rights or exercise thereof as a result of service performed by Switchmen Albrecht, Enderle, Gallagher, Hollis, Moore, Richereek, Roberts and Spainhower on the various dates here involved. Those individuals were employed by carrier as switchmen on the respective dates shown in paragraph 3 of "Carrier's Statement of Facts" and they established seniority as switchmen at Los Angeles as of

their first day of compensated service as such, in the same manner as any other person newly employed by carrier for service as switchman at that point. They were used as switchmen on dates of this claim in accordance with their acquired seniority as switchmen and their resultant standing on the extra board for such service, or on regular assignments acquired through exercise of such seniority, in strict compliance with all applicable provisions of the current agreement and in the same manner as any other newly employed switchman. Their status with relation to other switchmen in Los Angeles Yard was no different than the status of any other newly employed switchman and their use for service at the various times and dates specified in this claim, being under the same conditions and agreement provisions applicable to any person newly employed by carrier as switchman, was [8] thus without prejudice to the rights of any other switchman in Los Angeles Yard. In this connection the Board's attention is directed to claims involving a similar issue that were denied by this Board without aid of a referee in Awards 17653 and 18275.

Absent a showing by petitioner that carrier is restricted by some provision of the current agreement from freely selecting persons who it desires to employ as switchmen, carrier asserts that it has this exclusive prerogative. No showing to the contrary is made by petitioner and it cannot do so for the simple reason that no such restriction exists. The fact that a person selected by carrier for employment as a switchman might have and retain latent seniority as a brakeman (whether with this carrier or some other) would certainly not have any effect whatever on the basic right of selection, absent some contractual obligation specifically precluding such action. It is a fact which cannot be successfully refuted by petitioner that through the years carrier

has employed any number of persons as switchmen who were at the time in a cut-off status as brakeman, fireman, yardman, clerk or whatever from some other railroad, with retention of their seniority and subject to recall when needed (a common circumstance in the railroad industry) without any exception being taken thereto by petitioner. That is precisely what occurred in the instant case with the one immaterial exception that the persons employed as switchmen in this case had been cut off as brakemen by this carrier, immediately prior to such employment, instead of some other. It should be noticed that each of these employes (except one) had previously worked as a brakeman for the Union Pacific Railroad and it is an irrefutable fact, supported by [9] past occurrences, that petitioner would not challenge carrier's right to employ cut-off Union Pacific brakemen as switchmen, notwithstanding the fact they undoubtedly would retain (and perhaps still did) latent seniority as brakemen on the Union Pacific. Moreover, the question of a brakeman's right to retain latent seniority as such, whether with this carrier or some other, while employed as a switchman, is strictly a question that addresses itself to the organization representing brakemen and the agreement covering such employes.

In its "Statement of Facts" petitioner cites rules of the agreement and interpretations thereof, in effect prior to the date of the current agreement, which permitted brakemen to *transfer* to yard service *on a temporary basis,* if they made application in writing and if they could not work fifty (50) percent of the time as brakemen, and the action taken to cancel such provisions. They fail to mention a corollary request for a new rule presented by petitioner in the same proceedings, which read:

"Employes of the Company holding and accumulating seniority in another class and craft will not be permitted to acquire seniority as switchmen, temporary or otherwise, while still holding seniority in another class and craft; except this will not apply to employes promoted in accordance with Article 12, Section (a) of the current Yard Agreement."

Carrier declined to grant the above-requested rule and it was withdrawn by petitioner. When considered in the light of the above-quoted proposed rule, it is clear that the agreement provisions cited by petitioner applied primarily to brakemen who, while still having a working status, were unable to work fifty percent of their time as brakemen and desired to *temporarily transfer* into yard service, as [10] distinguished from circumstances where brakemen, cut off account insufficient work to permit them to retain a working status, seek employment as switchmen and who, when so employed, establish seniority as such in the same manner as any other newly employed switchmen, with the option of continuing in service as switchmen with such acquired seniority even though they might, at some later date, stand to be recalled for service as brakemen, as in the instant case. In this connection carrier submits that petitioner's submission of this claim is simply an attempt on its part to secure a rule which it could not obtain through the process of negotiations.

It is thus abundantly clear that none of the provisions of the current agreement, cited and relied on by petitioner, are involved in any way in this claim and under the circumstances neither the agreement provisions cited nor any other supports the claim presented.

Unable to cite any agreement provision or produce any authoritative evidence in support of its contention that the above-named individuals were not switchmen on dates of claim, petitioner attaches a photostatic copy of carrier's

Form CS 1132, covering changes in occupation, as Employe's Exhibit "C" and, in connection therewith, lays great stress on the word "loaner" appearing next to their names thereon, pointing out that "loaner" is a term applied to brakemen employes who are "loaned" from the brakemen's extra board. Carrier asserts that such reference in this instance was strictly an error on the part of the individual preparing said form and cannot be construed as a binding commitment on behalf of carrier. In any event, that notation, per se, does not change the fact that said individuals [11] were actually employed as switchmen and were in such a status on dates of claim. In this connection it will be noted that in the case covered by Award 18275 a "loaner" was also involved and that fact *did not alter* said "loaner's" status *as a new employe* in that case.

In addition to the agreement provisions cited, petitioner refers to Decision No. 1405 of Special Adjustment Board No. 18 and settlement covered by Company file YDM 148-3173. In each of those cases brakemen were improperly permitted to *temporarily transfer* into yard service under agreement provisions and interpretations then in effect (which were not in effect on dates here involved), as distinguished from the instant case where the individuals involved were in fact *employed as switchmen.* As a consequence, neither of those citations are involved or apply in this case.

In essence, petitioner is here challenging carrier's right to employ switchmen from whatever source available. This Board has long recognized and affirmed certain inherent prerogatives of management, including the right to supplement and otherwise regulate its working force in accordance with the requirements of the service. See Awards Nos. 12336, 15119, 15600, 15601, 15570, 15750 and 16032, which are

but a few of such awards. In the interest of brevity, carrier will quote from the "Findings" of only two of those awards.

In Award 12336, this Division stated in the Findings, in part, as follows:

> "*The choice of personnel* to discharge responsible duties in industry and commerce everywhere is recognized *as the prerogative of management.*" (emphasis added) [12]

In Award 15570, this Division stated in the Findings, in part, as follows:

> "This Division does not have the right to determine the *employment policies* or standards of the carrier." (emphasis added)

Carrier asserts that the principle enunciated in the above-quoted excerpts from the "Findings" in Awards Nos. 12336 and 15570 is applicable to the instant case and controls. The acquisition of new switchmen is the prerogative of carrier, as is the source from which they are obtained.

CONCLUSION

Carrier submits that the claim presented herein is without merit or agreement support and respectfully requests that said claim be denied.

All data herein submitted have been presented to the duly authorized representatives of the employes and are made a part of the particular question in dispute.

Carrier joins petitioner in waiving oral hearing.

FOR THE CARRIER:

/s/ K. K. Schomp
Manager of Personnel

San Francisco, California
November 8, 1961 [13]